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REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS.

BY

S. J. VAN KOUGHNET, M. A.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOLUME XX.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM, 33 VICTORIA, TO EASTER TERM, 33 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

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III

J U D G E S

OF THE

C O U R T O F C O M M O N P L E A S .

THE HON. JOHN HAWKINS HAGARTY, C.J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

Minister of Justice.

HON. SIR JOHN ALEXANDER MACDONALD, K.C.B.

Attorney-General.

HON. JOHN SANDFIELD MACDONALD.

T A B L E

OF

CASES REPORTED IN THIS VOLUME.

A.		C.	
	PAGE		PAGE
Ætna Insurance Co., McCollum v....	289	Calvin v. Provincial Insurance Co. . .	21
Allen, McAulay v.....	417	Calvin v. Provincial Insurance Co....	207
Amey, Grand Trunk Railway Co. v..	6	Campbell and Wife v. Great Western	
Appleton v. Lepper	138	Railway Co.	345
Ashford v. Choate	471	Campbell and Wife v. Great Western	
Ashford v. Victoria Mutual Assur-		Railway Company. (In Appeal)..	563
ance Co.....	434	Cartwright, Davey v.	1
		Caswell, Regina v	275
		Chamberlain v. Green et al.	304
B.		Chief Superintendent of Education,	
Baldwin, Yorkville & Vaughan Plank		<i>In re</i> Chapman v. Thrasher et al..	259
Road Company v.....	312	Chishom v Provincial Insurance Co..	11
Ball et al., Wade v.....	302	Choate, Ashford v	471
Bank of British North America, Roe v	351	City Bank v. Smith	93
Bank of Montreal, Wilson v.....	411	Clunas et al, Smith v	213
Barker, Johnston v	228	Coffey et al. v. The Quebec Bank.	110
Bishop, Waterous v	29	Coffey et al. v. The Quebec Bank.	
Bockus, Wilson v	467	(In Appeal).....	555
Bonter v. Northgrave	76	Corporation of Frontenac v. Corpora-	
Bonfield, McDonald v	73	tion of Kingston.....	49
Brill v. Grand Trunk Railway Co ...	9	Corporation of the Town of St. Catha-	
Brill v. Grand Trunk Railway Co....	440	rines v. Gardner.....	107
Brill, McIntosh v	426	Corporation of the Township of Barrie	
Brown, Switzer v.	193	v. Gillies et al.....	369
Bruce v. Gore District Mutual Assur-		Corporation of the County of Bruce,	
ance Co.....	207	Gibson, <i>In re</i> , v	398

C.		J.	
	PAGE		PAGE
Corporation of County of Renfrew, Hickey v.	429	Johnston v. Barker.	228
Cushman et al. v. Reid.	147	Joli et al., McKee v.	516
D.		K.	
Davey v. Cartwright.	1	Kastner v. Winstanley.	101
Donelly, <i>In re</i>	165	Kelly, Royal Canadian Bank v.	519
F.		King, Regina v.	246
Finch, Woolsey v.	132	Kingston, Corporation of, Corporation of Frontenac v.	49
Frontenac, Corporation of, v. Corpo- ration of Kingston.	49	L.	
G.		Law Society, Regina v.	490
Gardner, Corporation of the Town of St. Catharines v.	107	Leach, Thompson v.	241
Gibson, <i>In re</i> , v. Corporation of the County of Bruce.	398	Lepper, Appleton v.	128
Gillies et al., Corporation of the Town- ship of Barrie v.	369	Liverpool and London Globe Insur- ance Co., Appellants—Todd, Re- spondent, v. (<i>In Appeal</i> .)	523
Glass, Robertson v.	250	Lovekin, Lyman v.	363
Gordon, McMaster v.	16	Lowe v. Hall.	244
Gore District Mutual Assurance Co., Bruce v.	207	Lundy, Schaefer and Wife v.	487
Gould, Albert J., in the matter of the Queen v.	154	Lyman v. Lovekin.	362
Graham v. Heenan.	340	M.	
Grand Trunk Railway Co. v. Amey. .	6	Mander v. Royal Canadian Bank.	125
Grand Trunk Railway, Brill v.	9	Marshall v. Smith.	356
Grand Trunk Railway Co., Brill v. .	440	Martin v. Home Insurance Co.	447
Grand Trunk Railway Co., Hood v. .	361	Memoranda.	163, 353
Great Western Railway Co., Camp- bell and Wife v.	345	Mitchell et al, v. Smellie.	389
Great Western Railway Company, Campbell and Wife v. (<i>In Appeal</i> .)	563	Moffatt, Stewart v.	89
Green et al., Chamberlain v.	304	Montreal Insurance Co., Myles v. .	283
H.		Morell v. Wilmott.	378
Hall, Lowe v.	244	Myles v. Montreal Insurance Co.	283
Heenan, Graham v.	340	Mc.	
Hickey v. Corporation of County of Renfrew.	429	McAulay v. Allen.	417
Home Insurance Co., Martin v.	447	McCollum v. <i>Ætna</i> Insurance Co.	289
Hood v. Grand Trunk Railway Co. .	361	McCarty, Vannorman v.	42
Humphreys et al. v. Hunter.	456	McDonald v. Bonfield.	73
Hunter, Humphreys et al. v.	456	McIntosh v. Brill.	426
		McKee v. Joli et al.	516
		McKenna v. Powell.	394
		McKindsey v. Stewart.	295
		McMaster v. Gordon.	16
		McRae v. Robins et al.	135

TABLE OF CASES.

vii

N.	PAGE	S.	PAGE
Neff v. Thompson.....	211	Smellie, Mitchell et al. v.....	389
Northgrave, Bonter v.....	76	Smith, City Bank v.....	93
P.		Smith v. Clunas et al.....	213
Paterson v. Pyper.....	278	Smith, Marshall v.....	356
Paterson v. Wilcox.....	385	Stewart v. Moffatt.....	89
Phoenix Insurance Company, Shaw v.	170	Stewart, McKindsey v.....	295
Powell, McKenna v.....	394	Strachan, Regina v.....	182
Provincial Insurance Co., Weinaugh, Administrator of Burgy, v.....	405	Switzer v. Brown.....	193
Provincial Insurance Co., Calvin v...	21	Symonds v. Symonds et al.....	271
Provincial Insurance Co., Calvin v...	207	T.	
Provincial Insurance Co., Chishom v.	11	Thompson v. Leach.....	241
Pyper, Paterson v.....	278	Thompson, Neff v.....	211
Q.		Thrasher et al, Chief Superintendent of Education, <i>In re</i> Chapman v...	259
Quebec Bank, Coffey et al. v.....	110	Todd, Respondent, v. Liverpool and London Globe Insurance Co., Ap- pellants. (In Appeal.).....	523
Quebec Bank, Coffey et al. v. (In Ap- peal).....	555	V.	
Queen, in the matter of the, v. Albert J. Gould.....	154	Vannorman v. McCarty.....	42
R.		Victoria Mutual Assurance Co., Ash- ford v.....	434
Reid, Cushman et al. v.....	147	W.	
Regina v. Caswell.....	275	Wade v. Ball et al.....	302
Regina v. King.....	246	Waterous v. Bishop.....	29
Regina v. Law Society.....	490	Weinaugh, Administrator of Burgy, v. Provincial Insurance Co.....	405
Regina v. Strachan.....	182	Wilcox, Paterson v.....	385
Robertson v. Glass.....	250	Williams v. Robinson.....	255
Robins et al., McRae v.....	135	Wilmott, Morell v.....	378
Robinson, Williams v.....	255	Wilson v. Bank of Montreal.....	411
Roe v. Bank of British North Amer- ica.....	351	Wilson v. Bockus.....	469
Royal Canadian Bank v. Kelly.....	519	Winstanley, Kastner v.....	101
Royal Canadian Bank, Mander v.....	125	Woolsey v. Finch.....	132
Rules of Court.....	164, 354	Y.	
S.		Schaefer and Wife v. Lundy.....	487
Sharpe, in re, an Insolvent.....	82	Yorkville and Vaughan Plank Road Company v. Baldwin.....	312
Shaw v. Phoenix Insurance Company.	170		



REPORTS OF CASES
IN THE
COURT OF COMMON PLEAS.

MICHAELMAS TERM, 33 VICTORIA, 1869.

On the first day of this Term, THOMAS GALT, one of Her Majesty's Counsel, took his seat as one of the Judges of this Court, having been appointed during the preceding Easter Vacation, in the room of the Honorable JOHN WILSON, deceased.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

DAVEY V. CARTWRIGHT.

Cavalry troop—Quarter master—Horse exempt from distress—22 Vic. ch. 18, sec. 16—18 Vic. ch. 77, sec. 31.

Plaintiff was, under commission from the Governor General, dated 28th May, 1859, appointed *quarter-master* in a troop of volunteer militia cavalry: *Held*, that under the general powers conferred by 22 Vic. ch. 18, sec. 16, the Commander-in-chief might, at the date of this commission, have appointed a quarter-master to be attached to a cavalry troop, and that so long as he was serving with or attached to such troop he was an officer thereof, and his horse protected from distress under sec. 31 of 18 Vic. ch. 77.

Trespass for seizing and taking, as a distress for rent, a mare exempt as plaintiff's troop horse, as an officer of militia.

Pleas, Not guilty by statute 2 Geo. II. ch. 19, sec. 21, and justification under a distress for rent due by plaintiff to some of defendants.

Replication, That goodsseized were exempt, as a troop-horse, belonging to an officer of militia.

Issue.

The case was tried at the last spring assizes, at Napanee, before Wilson, J.

For the plaintiff one Swetman, Lieutenant-colonel of the active militia force, was called, who proved that plaintiff was quarter-master to the Napanee troop of cavalry; that as such he was entitled to a horse; that he had been out with the troop with his horse, a black mare, and that she was registered on the service roll. He further stated that he was out on duty, as quarter-master of the troop, at Kingston, during the raid in 1866; also at the annual drill in September, 1868, in the same capacity, and had a black mare with a white spot on the face.

On cross-examination he stated that plaintiff drove the mare in a buggy to Kingston, on duty, in June, 1866, but he was not in uniform, nor was he at any parade or drill while there, and he had not seen plaintiff on the mare since June, 1866, till the last drill in September, 1868, when he was present in uniform.

Two or three other witnesses were called who gave evidence much to the same effect.

It was proved that the seizure took place about 18th August, 1868.

A commission was produced, dated 28th May, 1859, from the Governor General, appointing plaintiff "quarter-master in the Napanee troop of volunteer militia cavalry, taking rank and precedence in said troop from 4th December, 1857, and in the militia of the Province from 3th December, 1857."

At the close of the plaintiff's case it was objected, for the defendants, that the mare was not an animal exempt from seizure under the Militia Act, because there was no evidence that she had ever been used by plaintiff as a troop-horse until September, 1868, after action brought; besides, that a horse was only exempt while in actual use; and lastly, that a quarter-master was not an officer of the troop at all under the act, for he was not there named.

The learned judge ruled that the horse of plaintiff, as quarter-master, was exempt from seizure ; that there was evidence that the horse had been used as a troop horse by plaintiff before the seizure and was being kept by him as such at the time of seizure.

Leave was reserved to defendants to move to enter a nonsuit or verdict, as the court might think fit, and the case went to the jury with a direction to find whether plaintiff, being an officer of the troop, did use the horse as his troop horse before the seizure.

The jury found for the plaintiff.

In Easter Term last, *McKenzie*, Q. C., obtained a rule *nisi* to enter a verdict for defendant on the leave reserved.

Holmsted shewed cause, citing *James's Military Dictionary*, "Quarter-master."

McKenzie, contra, cited *Bradley v. Arthur*, 4 B. & C. 304.

The statutes cited are referred to in the judgment of the court, which was delivered by HAGARTY, C. J.

The question for decision is, whether a horse of plaintiff, seized by defendants, as a distress for rent, was, when taken in August, 1868, exempt as a troop-horse under the Militia and Volunteer Acts.

The statute in force at the date of the commission, produced at the trial, was 18 Vic. ch. 77. Sec. 21, allows the formation of volunteer troops of cavalry ; sec. 22 declares that each volunteer troop of cavalry shall consist of a captain, a lieutenant and cornet, sergeants, corporals, buglers, and 43 privates ; sec. 31 provided that the arms and accoutrements of the officers and men of such volunteer companies and the horses used by them as such shall be exempt from seizure on execution, and from distress and assessment, nor shall any such horse be disposed of by any officer or man without leave of the officer commanding the company.

22 Vic. ch. 18, amending the last-mentioned act, and passed 4th May, 1859, a few days before the date of plain-

tiff's commission, has, in its 16th section, "the commander-in-chief shall have full power to appoint staff-officers of the active militia with such rank as he shall from time to time think requisite, &c., and any such staff-officers shall have such rank and authority in the militia as are held relative in her Majesty's service, &c." Sec. 15 allows the constituting of rifle companies into a regiment and battalion, and the appointing, among other officers, of one quarter-master.

The Consol. Stat. Canada, ch. 35, which came into force in 1859, repeats these provisions as to staff-officers, with the words, "and all such appointments made by him are hereby confirmed," and sec. 37 repeals the exemptions.

27 Vic. ch. 2, sec 110, repeals ch. 35 of Consol. Can., and ch. 3 of same Session provides for the volunteer militia force, sec. 2 providing that the several corps of volunteers existing before the act shall remain, &c., and sec. 6 provides for the officers of cavalry troops as before; sec. 12 repeals the exemption clauses as to troop-horses; sec. 32 enacts that commissions held by officers of volunteers existing immediately before the passing of this Act shall remain in force, subject to be cancelled by the commander-in-chief; sec. 38 allows the appointment of staff-officers of the volunteers by the commander-in-chief whenever he thinks it requisite for the efficiency of the volunteers, duties to be same as prescribed in the *Queen's Regulations*.

29 & 30 Vic. ch. 12 amends the principal Act, but not so as to affect this question.

The Dominion Act, 31 Vic. ch. 40, passed 22nd May, 1868, did not apparently come into force till after the present cause of action accrued, viz., 1st October following, unless an earlier day should be fixed by proclamation.

The defendants contend that plaintiff was not an officer of this cavalry troop or entitled to the statutable exemption; that the statutes declare who the officers of a troop shall be, and that it can have no such officer as a quarter-master.

I am not prepared to hold that the plaintiff's commission

was void. I think, under the general powers conferred by the statute, the commander-in-chief might, at the date of this commission, have appointed a quarter-master to be attached to a cavalry troop. If such a troop were called to active duty, not forming part of a battalion or regiment, the services of such an officer would be naturally required and almost indispensable. I do not read the statutes as preventing such an appointment, if deemed necessary by the commander-in-chief. It is quite true that the act declares that the officers of each troop shall be captain, lieutenant, and cornet, and that the horses of the officers and men of such troop shall be exempt from distress. If the commander-in-chief can appoint such an officer as a quarter-master specially to or for the troop, or can lawfully select or detail an officer holding the rank of quarter-master to serve with the troop, I think, so long as he is serving with or attached thereto, he is an officer thereof within the protection of the exemption clause.

We must, I think, look to the general scope and design of the statute, and see if the plaintiff's case comes fairly and reasonably within it.

The learned judge left the question of fact to the jury, did the plaintiff, being an officer of the troop, use the horse as his troop-horse before the seizure? There was evidence on this which I think he was bound to leave to the jury. They found for plaintiff. Had they found for defendant we should certainly not have interfered with their verdict; but, as there was evidence and the case fairly submitted to them, I think the verdict must stand.

Rule discharged.

GRAND TRUNK RAILWAY COMPANY V. AMEY.

Interlocutory judgment—Error.

Error will only lie upon a final judgment. Therefore, where the entry on the roll was, that the plea was held bad and the declaration good, and that plaintiff ought to recover his damages, &c., but because it was unknown, &c., judgment was stayed till damages ascertained, &c.: *Held*, that error would not lie on this record.

ERROR upon a judgment of the County Court of the County of Hastings.

The declaration was in case for breach of duty in not providing plaintiff with farm-crossings between portions of his land severed by the railway. To defendant's plea plaintiff demurred, and defendant joined in demurrer, and also excepted to the declaration. The entry on the roll was, that the plea was held bad and declaration good, and that plaintiff ought to recover his damages, &c.; but because it was unknown, &c., judgment was stayed till damages were ascertained, &c. Defendant brought error. Plaintiff joined in error, and objected, on argument, that error did not lie while the record was in this state.

M. C. Cameron, Q.C., for the plaintiffs in error.

Moss, contra.

HAGARTY, C.J.—In *Lush Pr.*, vol. 2, 658; error “must be founded on a *judgment*, as distinguished from an interlocutory order, or an adjudication in the nature of an award. * * The judgment, to be the subject of revision, must be one which either *ipso facto* prejudices the civil rights of the party against whom it is given, or upon which execution might be issued; otherwise, he cannot be said to be aggrieved thereby. Hence, error does not lie upon a judgment by default in assumpsit, case, or trespass, nor upon a judgment *quod computet*, in account, because they are merely interlocutory and something remains to be done before execution can be issued.”

1 *Arch. Pr.* 11 ed. 550 : "The judgment, however, upon which error is to be brought, must be final and not merely interlocutory." In the note it says, "This, it seems, must be understood with some qualification," citing sec. 19 Ass. 8, Rol. Ab. 675, 17 E. 3, 21, 33, Rol. Ab. 749, 750, 751, March 89, Noy 66, Palm. 1, 2. *Metcalf's case*, 11 *Coke Rep.* p. 68, Ed. 1826, seems in point: "It was resolved that no writ of error lies till the last judgment." Again, "that the writ of error, upon his judgment *quod computet*, before the final judgment given, lay not." Again, "In trespass for taking cattle, as to parcel defendant pleaded not guilty, as to the other he pleaded a pleading upon which plaintiff demurred, and afterwards the issue was found for the plaintiff, upon which he had judgment; but he shall not have writ of error till the whole matter is determined; and the reason is, if the record, should be removed before the whole matter is determined there would be a failure of right; for the judges of the King's Bench cannot proceed upon the matter which is not determined, and upon which no judgment is given, and the whole record ought to be either in the Common Pleas or the King's Bench; also, the original is entire and cannot be there and here likewise."

The authorities noticed in *Archbold's* note seem to refer to cases where the judgment is for recovery of land, dower, &c., and when a forfeiture was incurred on the award of an *exigent* in felony: see the exceptions noticed in *Metcalf's case*.

In *Samuel v. Judin* (6 East, 333) the declaration contained one good and two bad counts, and on demurrer a general judgment was given for plaintiff. On a writ of enquiry substantial damages were assessed on the good count, nominal on the other, which latter the plaintiff remitted, and prayed judgment on the first count, which was entered up accordingly. Error was brought, alleging misjoinder of counts in trover and assumpsit. Lord Ellenborough (after counsel urging that if the two last counts were bad the interlocutory general judgment was erroneous): "Error can only be brought on final judgment."

In *Mayor of Macclesfield v. Gee* (14 M. & W. 470) the head-note is, "A writ of error may be brought upon a judgment for plaintiff on demurrer. The defendant, if he choose, may for that purpose have a judgment of discontinuance entered on the record." The plaintiffs had signed judgment upon the demurrer and taxed their costs, and afterwards took out rule to discontinue. Parke, B., says: "I am of opinion that, if defendant insist on it, he may enter a judgment of discontinuance on the record, which is equivalent to a judgment of nonsuit, stating that plaintiff took nothing by his suit, but be in mercy, &c., and defendant go without day; so that the suit being thus terminated a writ of error may be brought on the judgment on demurrer on which the court gave judgment for the costs." It had been objected that by the course taken by plaintiff the defendant had lost his writ of error. Parke, B., says: "Some judgment of the court is necessary to shew that the suit terminated for any purpose, and that judgment may be entered of record. Thus there will then be an end of the suit, and defendant, if so advised, may bring his writ of error upon the judgment so entered of record. Rolfe, B., says: "If the plaintiff of his own act discontinue the proceedings in the cause, that fact may be entered on the roll, and if there has been an erroneous judgment given in an earlier stage of the proceedings, it may, like any other erroneous judgment, be set aside by writ of error."

In *Shepherd v. Sharp* (1 H. & N. 114) after judgment on demurrer for plaintiff to replication, plaintiff signed judgment for costs of demurrer and plaintiff discontinued. Error was brought and, on objection taken, the court held the case was governed by *Mayor of Macclesfield v. Gee*. Sir W. Erle says, "3 & 4 Wm. IV. ch. 42, sec. 34, makes the judgment on the demurrer a separate judgment for the costs." Crompton, J.: "It seems a distinct and separate judgment on which a writ of error lies, notwithstanding the action is put an end to by the discontinuance."

I am clearly of opinion that error does not lie on the record now brought before us.

Judgment for defendant in error.

BRILL V. GRAND TRUNK RAILWAY COMPANY.

Interpleader.

Goods belonging to plaintiff and stored in defendants' warehouse were alleged to have been sold by plaintiff to M., who, with plaintiff, came there and marked them in a certain way, after which, under *plaintiff's* instructions, they were despatched by defendants to T., *as plaintiff's property, and delivered to his order*. On the goods being claimed by M. as his property, defendants applied for an interpleader as between plaintiff and M., but *Held*, that in such a case interpleader would not be awarded.

This was an application for a rule *nisi* to rescind an order made by Gwynne, J., in Chambers, discharging a summons for an interpleader, under the following circumstances :

The defendants had a quantity of butter in their freight-house at Guelph as the plaintiff's property. While there the goods were alleged to have been sold by the plaintiff to one McKenzie, and the plaintiff's son and McKenzie came to the shed and the butter was weighed, and McKenzie marked it all "R. T." After this plaintiff came and said he wished the butter sent to Toronto, and the agent signed the usual shipping bill for the butter, setting out the marks as above mentioned, to be sent to Toronto as plaintiff's property, and to his order.

The goods were accordingly carried to Toronto.

McKenzie claimed them and swore they were sent to Toronto without his assent. The defendants then sought to make plaintiff and McKenzie interplead ; but the learned judge, before whom the application was heard, discharged the same, refusing to grant an interpleader.

Bell, Q.C., (of Belleville) obtained a rule *nisi* as above, citing C. S. U. C. ch. 30; *Best v. Hayes*, 1 H. & C. 718; *Meynell v. Angell*, 32 L. J. Q. B. 14; *Jew v. Wood*, 1 Cr. & Ph. 185.

HAGARTY, C. J., delivered the judgment of the court.

We have examined the cases on the subject. It is clear that the courts of common law expressly declare that they will order interpleader in cases where the practice of the

equity courts prevents such being done: see *Best v. Hayes* (1 H. & C. 718.) The mere fact of the defendant having incurred an original personal liability to the plaintiff would not, I think, bar his claim to interpleader. The last case cited refers to *Meynell v. Angell* (32 L. J. Q. B. 14) as laying down the true rule. It is to be observed that there has been a clause in the Imperial C. L. P. Act of 1860, enabling the courts to give relief, though the claims had not a common origin, but were adverse and independent. Before these cases it seems to be considered that the common law courts would follow the equity rule: see *Slaney v. Sidney* (14 M. & W. 800). The latest equity case I have seen is *Sablicich v. Russell* (L. R. 2 Eq. 441), before the present Chancellor, when V. C. Page Wood. I would gather from it that the defendants here would doubtless be refused relief.

I am satisfied that neither at law nor in equity would interpleader be allowed in this case.

If defendants wished to stand fairly between the parties they should not have dealt with the goods after full notice of McKenzie's claim at Guelph. There they were fully aware of his alleged right, and saw him weigh and mark the goods. With this knowledge they enter into a new contract with plaintiff Brill, and send the goods to Toronto as his and subject to his order, thus enabling him, had he pleased, to sell the goods to an innocent purchaser on the freight bill.

I think it impossible to relieve them under such facts. They seem to me to have deliberately chosen their side in the dispute, and to have knowingly cast in their lot with one of the disputants.

If they could send the goods to Toronto under a new contract with Brill, as his property, they could have equally sent them to New York or Liverpool and still claim to interplead.

I think my brother Gwynne rightly refused the order.

Rule refused.

CHISHOM V. THE PROVINCIAL INSURANCE COMPANY.

Insurance—Assignment of policy to mortgagee—Arson by assured—Equitable replication disclosing no new facts—Pleading.

Declaration, on a fire policy to plaintiff on premises subsequently mortgaged for \$2000 to one S., alleging an assignment of the policy by plaintiff, with defendants' assent, to S.; that S. continued interested to \$2000 down to loss, and plaintiff, during all the time last aforesaid, and at the time of the loss, was interested therein to said amount so insured, as also as trustee for S. Then, after setting out the loss, it proceeded, whereby said S. and plaintiff, as trustee for him, *and in his own right* suffered damage, &c.

Plea, Arson by plaintiff.

Replication, on equitable grounds, that before loss the policy was, with defendants' assent, duly assigned to S., and the action was brought by plaintiff, as trustee, and for benefit of S.

Held, on demurrer, replication bad.

DECLARATION on a fire policy to plaintiff on certain premises afterwards conveyed by way of mortgage to one Sidebotham, to secure \$2000, and setting out an assignment and transfer of the policy by plaintiff to Sidebotham, to which defendants assented; that Sidebotham continued interested to \$2000 down to the loss, "and plaintiff, during all the time last aforesaid and at the time of loss, was interested therein to said amount so insured, as aforesaid, and also as trustee of said Sidebotham." The loss by fire was then set out, "whereby said Sidebotham and plaintiff, as trustee for him, *and in his own right*, suffered damage and loss, &c."

To this was pleaded arson by plaintiff.

Replication, on equitable grounds, that before the loss the policy was, with defendants' assent, duly assigned to Sidebotham, and the action was brought by plaintiff as trustee and for the benefit of Sidebotham.

Demurrer, that said replication confessed said plea but did not avoid same by any sufficient answer either at law or in equity; that though said Sidebotham might be beneficially interested, still it was brought in name of plaintiff, who, it was claimed in declaration, also had and retained an interest in the premises and suffered loss in his own right by the fire, and in any case, if plaintiff had sufficient interest to maintain action at all, the plea of

arson was a good defence; that the fact of the fire being feloniously begun, caused or procured by plaintiff, either alone or with others, or by the knowledge, consent or procurement of plaintiff himself, which was admitted by replication, would disentitle plaintiff to recover either in his own right or in right of any other person.

Duggan, Q.C., for the demurrer, cited *Burton v. Gore Dist. Mut. Ins. Co.*, 14 U. C. 342, S. C. 12 Gr. 158; *Foster v. Jackson*, 1 E. & E. 463.

Anderson and Crombie, contra, cited *De Pothonier v. DeMattos*, 1 E. B. & E. 467, per Lord Campbell; *Kreutz v. Niagara Dist. Fire Ins. Co.*, 16 C. P. 131.

HAGARTY, C. J.—I am of opinion that neither in law nor in equity does the replication answer the plea. The interest of Chishom the plaintiff is stated as still subsisting. The replication discloses no fact not already averred in the declaration. It does not attempt to negative the existence of any interest in Chishom, and appears to me to leave the record substantially resting on the declaration, with the plea of arson pleaded thereto. Unless that plea is bad upon demurrer, I cannot see how the replication aids it in any way. That the plea offers a good legal bar I have no doubt.

It is to be observed that we know nothing of this contract of insurance beyond what is on the record. No special agreement is averred as to the effect of an assignment of the policy, nor of the possible creation of any new right in the assignee apart from the rights of plaintiff, the person originally assured. It is merely stated that the policy was assigned with defendants' assent.

I think it impossible to hold, at least on this record, that plaintiff's felonious destruction of the subject matter of the assurance, does not avoid the contract.

The plaintiff seems to be in this difficulty: his declaration clearly avers an interest still in himself, besides the interest of Sidebotham, as mortgagee. Assuming, for the

sake of argument, that the interest of the latter can be protected, apart from Chishom's interest, by the court of equity, it seems clear to me that this court of law cannot work out and give full effect to the alleged equity. The relief could not be unconditional. This would at once dispose of the replication. Or, if the replication urge an equitable objection to the pleading of the defence of arson, while at the same time disclosing no new fact, but simply repeating a statement in the declaration, does it not then seem that the suit at law is misconceived, and that the alleged *cestui que trust*, Sidebotham, should have originally sought his remedy in equity?

In this view it is unnecessary to discuss some of the wider questions suggested in the argument, as to the effect of an assignment of a policy with assent of the underwriters.

GWYNNE, J.—From the allegations contained in the declaration it appears that the plaintiff was the owner of the property insured, and that he caused the policy in question to be effected for his own security; that subsequently he mortgaged the property to Sidebotham and assigned the policy, with the assent of the defendants, to him.

This, then, is not the case of a mortgagee effecting a policy of insurance upon *his own interest*. What is insured by the policy is not the *interest* of the mortgagee *in* the property, but the property itself, which was the property of the mortgagor; and what has been assigned to the mortgagee is the contract contained in the policy, which is the contract entered into between the defendants and the mortgagor, the benefit of which is assigned to the mortgagee. Now, at law it appears to be clear that the effect of the transaction is that the insurance company assent to the assignment of the benefit of the contract to the mortgagee, subject to all the incidents, as to forfeiture, to which the policy was subject in the hands of the mortgagor, with whom the contract had been entered into. But it is contended that the assignment of the policy by the mortgagor to the mortgagee, with the assent of the defendants, con-

stitutes *in equity* a new contract between the mortgagee and the defendants, having the same effect in equity, for the protection of the mortgagee's *interest* in the property, as an express contract of insurance of such *interest* would have at law, and that therefore the equitable replication to the plea of arson, committed by the mortgagor, is a good replication under the Common Law Procedure Act. But the adoption of this argument seems to involve the plaintiff in this dilemma, that, whereas in the declaration he sues upon the *legal* contract made with himself, contained in the policy, he claims the right, in his replication, of supporting that cause of action, by setting up what he himself asserts is a *wholly new contract of an equitable nature*, made between the mortgagee and the defendants, wherein the plaintiff is not interested otherwise than nominally, as a trustee. Now, true it is that the assignor of a chose in action can sue at law, for the benefit of his assignee, upon an obligation entered into with the assignor, and that the defendant in such action would, before the passing of the Common Law Procedure Act, have been prevented from setting up, in defence of such action, any such dealing by the defendant, obligor, with the plaintiff, obligee, as constituted a fraud upon the assignee; and, upon that principle it is, as decided in *Pothonier v DeMattos* (El. Bl. & El. 466), that since the statute a replication, setting up such a fraudulent dealing, is admitted, as a good replication upon equitable grounds, to a plea alleging a legal bar to the action; but here the plea of arson sets up no dealing whatever, to which the defendants were parties, fraudulent to the assignee, or otherwise, as a bar to the action, and the question appears to be, could a court of law, in the exercise of its equitable jurisdiction, before the statute, have properly prevented the defendants from setting up arson, committed by the plaintiff, as a bar to the action? I have been unable to find any authority which goes the length of deciding that it would, and upon principle I think that it should not. But further, if, as is contended, the old contract was done away with, and a

new equitable contract entered into between the mortgagee and the defendants, and that such *new contract* constitutes the right of the plaintiff trustee to recover against the defendants, the enforcement of that contract must be sought in a court of equity, for the statute allows no form of equitable declaration. Moreover, in this case, the plaintiff in his declaration asserts a claim in his own right, as the owner of the property, and *also* in right of his assignee, and he alleges that the plaintiff, that is, the owner of the property, from the time of the assignment of the policy to Sidebotham, and at the time of the loss, was interested in the insured premises, and in the policy so assigned, to the amount insured, *and also* as a trustee for Sidebotham. That the plaintiff was in fact interested in the policy to its full amount, appears, I think, sufficiently clear from what is stated in the declaration. It is, however, expressly alleged that he was; and, moreover, the declaration alleges that the plaintiff, not only as trustee for Sidebotham, *but in his own right*, suffered damage and loss to the amount of the insurance. Now, the answer to the plea of arson, pleaded in bar of the whole action, in effect is, that, as to part of the cause of action set out in the declaration, to which the plea is pleaded, namely, in so far as the interest of Sidebotham is concerned, the plea ought not to prevail, for the reasons, upon equitable grounds, stated in the replication; so that the plea remains a good answer, it is admitted, to so much of the declaration as seeks to recover in right of the plaintiff himself, the owner of the property. I have not been able to find any authority for holding, and I am not prepared to admit, that a replication, upon equitable grounds, which in substance covers only *part* of the matter in the declaration, to which the plea is pleaded in bar, can be admitted as a good replication to the whole plea. I think, therefore, that the demurrer to this replication must be allowed, without entering into the enquiry whether any court of law or equity, governed by decisions in the English courts, will deprive an insurance company of the benefit of the

plea of arson, admitted on the record to have been committed by the person with whom the contract contained in the policy sued upon was entered into, when the policy has been assigned by the insured, and the interest of the insured in the insured premises continues, although the assignment has been made with the assent of the insurers.

Judgment for defendants on demurrer.

McMASTER V. GORDON.

Sale of goods—Statute of Frauds—Acceptance—Goods not answering contract.

There may be an acceptance of goods, so as to take the case out of the Statute of Frauds and let in proof of the parol bargain, leaving the parties still able to object that goods do not answer the contract, &c.

DECLARATION, goods sold and delivered.

Plea, never indebted.

At the trial at Toronto, before Galt, J., without a jury, it appeared that a commission-merchant named Harvey, acting for plaintiff, who resided in Montreal, verbally sold a lot of tweeds to defendants, merchants in Toronto, at fifty cents per yard. He informed his Montreal principal, and an invoice of the goods was sent to him, at Hamilton, which he transmitted, with bill of lading of the goods endorsed, to defendants, at Toronto. The invoice was headed in Harvey's name, as vendor, and was dated 4th December, 1868. On 7th December an advice note was sent to defendants from the Grand Trunk Railway in Toronto, apprising them of the arrival of seven cases of goods from Montreal, and on December 11th a similar notice as to one case of goods, and as usual declaring they were from thenceforth at owner's risk.

On 6th January, the goods were received by defendants in their store, the defendants having sent for them to the station. The invoice of the goods had been received prior

to sending for them. They were opened on the 6th January by defendants. Their clerk said he called their attention to the fact that the pieces were longer than called for by the bargain.

While the goods were at the station defendants sold some of them from the sample. Sales were made in December, twelve, eight, and six pieces; but their clerk said that, as they did not keep the goods, the orders were not filled or the goods delivered.

On 7th January defendants wrote to Harvey: "We have opened the tweeds, at fifty cents, to-day, and a sorry lot they are: would give something handsome to get out of them. However, there is one thing not taken off the invoice, which I did not notice, the usual measure, which we must have. There are also some twelve or fourteen pieces or ends that we did not buy, and which we cannot accept at same price. We find that the lot will average twenty-five yards, instead of fifteen, as you said: the measure we must have.

On 27th January Harvey wrote saying he had had reply about tweeds, but his principal refused to allow the measure, assigning reasons, and offering to take back the pieces over what were represented by samples, and that defendants could return them to him.

There was a letter of defendants, mentioned in Harvey's letter of 28th January, which was not accounted for.

By letter of 28th January defendants said: "We decline these tweeds now altogether: will not have them at any price: lengths are in excess of quantities sold by you: there are more goods than I bought and no measure allowed, &c., &c., &c.: will now box them up and send them where you say." After defendants' first letter Harvey said this at their warehouse, the goods being then there. The "measure" spoken of was a trade allowance of five per cent. on length of the cloth. Harvey offered to take back the fourteen pieces objected to. Defendants said if the other matter, viz., the measurement, was made right, this would not signify. They offered to take the goods if the five per cent. measurement were allowed.

Defendants' clerk said it was not necessary the allowance should appear as a deduction from the price : it was sometimes made in an increased length.

Defendants' counsel moved for a nonsuit, on the ground that there was no evidence to satisfy the Statute of Frauds ; that the difference in length was material and shewed such a discrepancy as repelled the idea of any binding agreement.

It was urged, in reply, that a contract was shewn, and delivery in pursuance thereof ; that the invoice received by defendants shewed the length of the pieces, and that there was no deduction of five per cent. ; that defendants, having taken the goods from the station, must be held to have accepted them on the terms of the invoice ; that their letter of 7th January shewed they had accepted ; that they kept the goods an unreasonable time.

The learned judge, who tried the case without a jury, held that the provisions of the Statute of Frauds had not been complied with, and he therefore found for defendants, with leave to plaintiffs to move on any points of the case they might be advised, and to enter a verdict in their favor for \$3301.73.

J. K. Kerr, obtained a rule on the leave reserved, and on the ground that there was evidence of sale, receipt and acceptance by defendants.

Read, Q.C., shewed cause.

HAGARTY, C. J., delivered the judgment of the court.

We think there must be a new trial, with costs to abide the event.

Apart from the sufficiency of a written contract, it should have been found for our guidance, as a fact, whether the defendants accepted the goods or not.

If there were such acceptance in fact, the plaintiff should have had a verdict, subject to any question raised in evidence as to the propriety of the 5 per cent. measurement. If the acceptance in fact were not found against defendants, it would be necessary to enter into a discussion as to the

existence of a sufficient note or memorandum of the bargain on the Statute of Frauds, and how far the defendants' letters and the invoices received and referred to therein can constitute a written contract.

This latter question does not seem to have been suggested at the trial, nor was it argued in term.

I have no hesitation in saying that I think a very strong case was made out at the trial against defendants, as having both received and accepted the goods, at all events, so as to let in evidence of the oral contract and satisfy the Statute of Frauds.

They received notice of the arrival at the station, in Toronto, and an invoice, describing all the pieces, and giving the price and number of yards. They contract with parties for the sale of different portions. They leave them over three weeks at the station and then take them to their warehouse and open them.

Next day they write to Harvey, certainly not refusing to take them, but, on the contrary, saying they would give something handsome to be out of them, but there was one thing that they must have, that is, the measurement allowance, and that some 12 or 14 pieces or ends were sent which they did not buy and could not accept. I cannot possibly read that letter except as the declaration of parties that they had to take them and were sorry for it, and claiming a trade allowance on the measurement.

Then, after some correspondence with Harvey, on 28th January defendant wrote, "I decline these tweeds *now* altogether."

All these circumstances put together would be fit to submit to a jury, as evidence of acceptance.

There is a review of the cases in *Addison* on Contracts (Ed. of 1869).

It seems from modern authorities that there may be an acceptance and receipt of the goods within the Statute of Frauds, leaving the purchaser still able to object to them as not answering the contract.

Lord Campbell, in *Morton v. Tibbett* (15 Q. B. 441), after

an elaborate review of the cases, says : " There are express decisions, through a long course of years, that there may be an acceptance and receipt of goods by a purchaser, within the Statute of Frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. We approve of these decisions, thinking that they do not infringe upon the Statute of Frauds, and that they conduce to fair dealing in trade." The true distinction is well put, the acceptance merely fulfils the statute, and, in Lord Campbell's words, it " is merely to waive written evidence of the contract, *and to allow the contract to be established by parol, as before the Statute of Frauds was passed.* The question may then arise whether it has been performed either by the one side or the other."

As I understand it, if defendant accepted the goods, so as to fulfil the statute, it enables the parties to go into evidence of the parol bargain, leaving it open to defendants to raise any objection as to quality, &c. *Bushel v. Wheeler*, in same vol. is also to be noted. *Morton v. Tibbets* was decided in 1850. It is recognised as sound in *Currie v. Anderson* (2 El. & El. 592, in 1860.) The question of what is an acceptance is there much discussed, and reference made to *Meredith v. Meigh* (2 E & B. 354). Crompton, J., there says, "When the goods, or the *indicia* of the property in goods, remains long under the control of the vendee, especially when the vendee has in any respect acted as owner of the goods, there may be sufficient evidence of an acceptance and receipt, although the goods themselves are not received."

On the other branch of the case, as to whether between the invoice and the defendants' letters, there may be made out a sufficient written contract under the Statute, the law is very fully reviewed in *Bailey v. Sweeting* (9 C. B. N. S. 843) ; also in *Wilkinson v. Evans* (L. R. 1 C. P. 407.)

The invoice has the names of the parties, quantity of goods and prices. Defendants' letter refers thereto and makes certain objections.

I think we should not dispose of this branch of the case without its being argued.

At the next trial it can be fully raised and reserved for the court, if necessary.

[GALT, J., stated that after examining the authorities he thought he would have found as a fact that there was an acceptance, so as to let in proof of the parol bargain.]

Rule absolute for new trial, costs to abide event.

CALVIN V. PROVINCIAL INSURANCE COMPANY.

Marine Insurance—Loss—Agreement to raise vessel not under seal—Averment of agent being duly authorized—Joint and several contract by two companies—Action against one—Absence of plea in abatement—Pleading.

Declaration on a marine policy, setting out the issue of same by defendants, and of a similar one by another company; that vessel lost; that by policy defendants allowed in certain cases to interpose, recover and repair vessel; that vessel sank while towed by plaintiff's tug; that plaintiffs and other company, being desirous of recovering vessel, *by their respective duly authorized agents in that behalf, entered into an agreement in writing with plaintiff*, reciting loss, and that plaintiff should raise vessel for \$3000, and plaintiff, defendants, and the other company should submit to the arbitrament of arbitrators, one to be chosen by plaintiff, another by defendants and the other company, and the third by two so chosen, the question by whom said money and other expenses should be paid, &c.; that plaintiffs raised vessel; had always been willing to appoint, and did appoint, an arbitrator, and was willing to submit such question, &c., of which two companies had notice, and although plaintiff requested them, &c., yet defendants always since *wrongfully REFUSED, either in concert with other company or otherwise, to appoint arbitrator, and always wrongfully refused and continued to refuse to appoint or concur in appointing on their behalf and that of the other company*, and by reason of such wrongful refusal, &c., &c.

Held, on demurrer, good, and that an objection that the agreement was not shewn to have been under seal was premature, for that it might either arise as a matter of evidence at the trial, or be made the subject of a plea; and that in the face of the averment that the act done, by which it was sought to bind defendants, was *by an agent duly authorized*, it could not be assumed that the authority was not full and sufficient.

Held, also, that the contract disclosed was joint; that defendants could have pleaded in abatement; that each was liable for the other, whether the joint non-performance was caused by such other or not; and that, there being no plea in abatement, the declaration was good against the demurrer.

DECLARATION on a marine policy, setting out that defendants had issued same on the schooner "Rapid," and another company (the Home Insurance Co.) had done the same; that the "Rapid" was sunk at Kingston; that by the policy the underwriters were in certain cases allowed to interpose and recover and repair the vessel; that the vessel was sunk while towed by a tug of plaintiff's; that defendants and the other company, being desirous of taking prompt means for the recovery and repair of the vessel, *by their respective duly authorized agents in that behalf entered into an agreement in writing with plaintiff*, reciting the loss, and that plaintiff should raise the vessel for the price of \$3000, and plaintiff, defendants and the Home Company should submit to the arbitrament of three arbitrators, one to be chosen by plaintiff, the other by defendants and the Home Company, and the third by the two so chosen, the question by whom the said money and the other expenses of repairing the vessel should be paid, the arbitration to take place forthwith; that plaintiff thereupon raised the vessel; that plaintiff had always been willing since the agreement to appoint and did appoint an arbitrator, and was ready to submit such question, &c., of which the two companies had notice; and although plaintiff requested the two companies, &c., yet the defendants had always since making the agreement *wrongfully refused, either in concert with the Home Insurance Company, or otherwise, to appoint an arbitrator under the agreement, and had always so wrongfully refused and wrongfully continued to refuse to appoint or concur in appointing on their behalf and that of the Home Insurance Company an arbitrator under said agreement*, and by means of such wrongful refusal they had withheld from plaintiff and deprived them of said sum of \$3000 and expenses, nor had defendants or the Home Company paid, &c.

Demurrer. 1. That an agreement was shewn by defendants, a corporation, not under seal. 2. That no liability was disclosed to pay plaintiff, and it was sought to make defendants liable for a breach of agreement by the Home Insurance Co.

J. H. Cameron, Q. C., and Duggan, Q. C., for the demurrer, cited Calvin v. Provincial Ins. Co., 27 U. C. 403; Thames Iron Works Co. v. Royal Steampacket Co., 13 C. B. 358; London Dock Co. v. Sinnot, 8 E. & B 347; Houck v. Township of Whitby, 14 Grant, 671.

Crooks, Q. C., contra, cited Livingstone v. Ralli, 5 E. & B. 132; Beckh v. Page, 5 C. B. N. S. 708; Goldstone v. Osborn, 2 C. & P. 551; South Ireland Colliery Co. v. Waddell, L. R. 3 C. P. 462.

HAGARTY, C. J.—As to the first objection, to the want of a seal, my present impression is that the objection is premature; that it will either arise as a matter of evidence at the trial, or be made the subject of a plea, as in the case of *London Docks v. Sinnot* (8 E. & B. 347.) The plaintiffs sued for a breach of contract, setting out defendant's tender to do certain work and that the plaintiff duly accepted the same. *Plea*, that "the alleged acceptance of plaintiff was by parol only, and not under the seal of the company, nor was it authorized by them under their seal." On demurrer to this plea the question of a corporation's liability without seal was fully discussed, and defendant had judgment, the contract not being of a mercantile character, &c., or part of their ordinary business, &c.

It may well be, in the case before us, that "the duly authorized agent" of the defendants, who made the agreement in question, may have been appointed under the corporate seal, and thereby specially empowered to do the very act and make the very contract set out. If "duly authorized" by a corporation we should, I think, infer that he had such complete authority.

The defendants' business was the insurance of vessels, and their contracts expressly allow their interposing for their own protection to recover and repair them. Prompt action would be required in many cases by the company's agents at a distance from the head office. It would not seem unreasonable to consider the agents on the spot

clothed with full power to act for their protection, and the subject matter of such action would, I think, fall naturally within the ordinary business of a body of underwriters.

One of the latest expositions of the law is in L. R. 3 C. P. 468, *South of Ireland Colliery Co. v. Waddle*. The cases are examined at length. Bovill, C. J., says: "A company can only carry on business by agents, managers and others, and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal." Byles, J., takes the same view, adding, "It is impossible to reconcile all the dicta upon this subject: it would be difficult, perhaps, to reconcile all the decisions." Montague Smith, J., says: "The seal is required only in matters of unusual and extraordinary character, which are not likely to arise in the ordinary course of business." * * * Wightman, J., who was an extremely cautious judge, said, "The result of the cases seems to me to be, that whenever the contract is made with relation to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced, though not under seal." This case, decided last year, may be considered as the latest expression of legal opinion on this vexed question.

Now, assuming that an insurance company must act through agents, I think it highly probable that an ordinary agent would be held to be transcending his implied powers in entering into an agreement, such as is set forth in the declaration, for the raising of a vessel at a heavy expense and an ultimate reference to arbitration, between the person doing the work and his own company and another company, as to the respective liabilities of the three contracting parties to pay therefor. But in this declaration the act done, by which it is sought to bind the corporation, is alleged to have been done by an agent duly authorized. The precise nature of the authority so given to him is not further stated. I think I cannot assume against the plaintiff that the authority was not full and sufficient.

I have always understood that it is not necessary in a declaration to aver, with the same preciseness and certainty as in a plea, such matters as authority, whether contract was in writing under Statute of Frauds, &c., &c.

On the second ground of demurrer I feel some difficulty from the very peculiar nature of the agreement set forth. It appears to me that the contract is a joint and not a joint and several contract by the two companies. It is joint in its language, and the subject matter was clearly jointly obligatory on them. Plaintiff was to choose one arbitrator; the two companies another; the companies stood in the same interest, as underwriters of the vessel, responsible in any event to the assured for the loss; they jointly agree to do an act which neither can perform without the other, viz., the joint selection of a referee; the plaintiff only sues one, and he does not aver directly that the other is either willing or unwilling to join in doing the act, and it may even be that it is the default of the Home Insurance Company that the referee has not been appointed. It is true that it is charged in the breach that the defendants unlawfully refuse to appoint, *or to concur in appointing*, on their behalf and that of the Home Insurance Company, an arbitrator under the agreement. This indirectly seems to assert that it is the defendants who refuse to join in appointing the referee.

It seems to me that the two companies, each at its own risk, undertake that they will concur in the appointment, and each is responsible for the other's default. One might refuse altogether to appoint, or the two might not be able to agree in the selection, but they have knowingly undertaken the liability; as is said by Abbott, J., in *Richards v. Heather*, (1 B. & Al. 35), "By the law of England, when several persons make a joint contract, each is liable for the whole, though the contract is joint."

There is a case in 7 T. R. 352, *Mansell v. Burredge et al.* where two several tenants of a farm agreed with the incoming tenant to refer certain differences respecting the farm, *and jointly and severally* promised to perform the award. The arbitrators awarded that each of them

should pay a certain sum to the third : *Held*, they were jointly responsible each for the other. It was urged that there was no joint duty thrown on them, and therefore it was not a joint promise. Lord Kenyon said, "it was a hard case, but they had promised jointly and severally, which makes them responsible, the one for the other." Had the promise been joint only, the decision would have been the same.

In *Lilly v. Hedges* (8 Mod. 166, S. C. Strange 553) defendant and one G. covenanted for themselves and for each of them, with plaintiff and C., to receive rents due to plaintiff and C., and to pay a moiety to each, to plaintiff and C. : *Breach*, that defendant and G. received so much and defendant did not pay a moiety to plaintiff. After verdict, on general issue, it was moved to arrest judgment : it was held that plaintiff should take his judgment, because defendant had covenanted for the acts of his companion as well as for his own acts, and the breach and nonperformance being laid jointly against both covenantors, it is well enough. The other objection, as to C. not being joined as plaintiff, I need not notice.

There seems no difficulty in holding two persons to covenant jointly for each doing or joining in an act, though the default of either might prevent performance by the other. And, again, when two covenant jointly and severally, one may be sued only, though their interest in the subject matter of the covenant be joint : 1 Wm. *Saunders* 154 a. "And even if the covenant were joint and an action brought against *one* of the covenantors, he could only take advantage of it by a plea in abatement." See also 2 Wm. *Saund.* 210 d. note s. : "The non-joinder must be pleaded, and if it be not, no advantage can be taken, although the declaration itself discloses the non-joinder," referring to *Addison v. Overend*, (6 T. R. 766).

There Lord Kenyon says : "Formerly, indeed, especially in cases of contract, it was held that if it appeared at the trial that there was a joint contract, and one only of the contracting parties was sued, it was a decisive objection

against the plaintiff's action ; but afterwards, for the convenience of the suitors, it was held, on considering the principles on which these decisions proceeded, that if a defendant meant to avail himself of such an objection, he must plead in abatement :” *Whelpdale's case*, 5 Co. 119.

I have come to the conclusion, (1) that the contract is joint. (2) That defendants could have pleaded in abatement. (3) That each is liable for the other, whether the joint non-performance be caused by such other or not, and (4) there being no plea in abatement, the declaration is good against the demurrer.

As to the general question of an action lying for damages for refusing to refer to arbitration, pursuant to an agreement made in view of differences arising, the case cited by *Mr. Crooks*, *Livingstone v. Ralli* (5 E. & Bl. 132) is in point.

I may foresee great difficulties in plaintiff's way, in the future stages of the suit, and if it reach a jury, a difficulty also may arise in assessing the damages. I have now only to hold that I think there should be judgment for plaintiff on demurrer.

GWYNNE, J.—I concur in the opinion that the objection urged to this declaration, that it does not shew that the contract sued upon is authorized by or under the seal of the company, is premature. It may be, consistently with the allegations in this declaration, that the defendants executed a deed, under their corporate seal, specially authorizing an agent named therein to enter into the identical contract, its precise terms being expanded in the instrument, and containing a clause binding themselves to comply with the agreement when so entered into by such agent. If it be contended that, notwithstanding such an instrument under the seal of the company, they would still not be bound, although the agreement signed by the agent, so appointed, corresponded precisely with the agreement set out in the instrument, and which he was so authorized to enter into, I think that point should be raised more precisely than it can

be by demurrer to this declaration. We cannot, I think, upon this demurrer decide that this company could not be bound by a contract entered into under such circumstances. If the contract sued upon was not entered into by an agent having authority under seal to enter into it, or if it was made beyond the powers of the company, these are matters which, as it appears to me, should be raised by plea. Assuming the contract to be binding on the company as to its form, I think we must construe the terms to be, as far as they appear upon this record, *ut res magis valeat quam pereat*, that both the defendants and the Home Insurance Company contract jointly that they will concur in appointing an arbitrator; for otherwise the contract might be utterly incapable of being enforced against them either jointly or separately. The Home Insurance Company might be willing enough to appoint A., but unwilling to appoint any other person, as arbitrator. The Provincial might have a good objection to A., but be willing to appoint B., or any other person. If they should each express their readiness to appoint an arbitrator, and should in fact name distinct persons, the contract is fruitless unless they concur upon one. If the contract is thus to have any validity, how can this be, unless it be construed to be a contract that *they will* concur, which can only be fulfilled *by their concurring* upon one person, and so both will be liable unless they *do* concur, and each of them also separately, unless, at least, the one sued should plead in abatement. If the contract be validly entered into, we must give it such a construction as will render it capable of being enforced, and not enable each, while professing to perform their own part, to evade it altogether.

GALT, J., concurred.

Judgment for plaintiff on demurrer.

WATEROUS V. BISHOP.

Patent—New application of old invention, but no discovery of new principle.

In an action for infringement of patent, described as “a new and useful improvement in the construction of steam and water saw-mills,” it appeared from the specifications that what the patentee claimed as his invention was “generally the simplicity of construction of the saw-mill and making it portable, but specially the direct application of steam or water power by the connecting rod or shaft B to drive the circular saw.”

Plaintiff, the assignee of the original patentee, proved that apparently his plan was the first in which the direct application of the motive power was made to drive circular saws, by placing the saw at the end of the shaft to which the motive power was directly applied, thereby saving the use of the belts and pulleys, by which the second shaft, to which the saw had been attached, was turned, and discontinuing that shaft also. For the defence it was shewn that “direct action” plan had long before the date of the patent in question been applied to other steam engines, locomotives and machinery, the only novelty appearing to be in the discontinuance of the second shaft in driving a circular saw.

The jury were directed to enquire whether the invention was new, or whether it was a new application of an old invention to the propelling of a circular saw, and they found that the patent was for “a new application of an old invention to the propelling of a circular saw:”

Held, that upon this direction the verdict could not be supported, and that the proper question was whether the invention was novel and useful.

Held, also, following *Smith v. Mutchmore*, 11 C. P. 458, and *Smith v. Ball*, 21 U. C. 123, in which the same patent was in question, that the specifications must be taken to be sufficient.

Semble, that the invention or improvement, claimed by plaintiff in this case, was not the subject of a patent.

The saving of labour and expense, and the production of a new and useful result, cannot alone support a patent: there must be some *invention*.

The art or contrivance, which is the subject of a patent, must be new, and it is not sufficient that the object or application of the contrivance itself be old.

[See also *Parkes v. Stevens*, L. R. 8 Eq. 358; Ch. App. W. N. Nov. 20, 1869, p. 225.—REP.]

ACTION by assignee of a patent for infringement of same, described as “a new and useful improvement in the construction of steam and water saw-mills.”

Pleas—1. *Non concessit*. 2. Not the first and true inventor. 3. Not guilty. 4. That the specification did not contain the whole truth. 5. That specification contained more than was necessary to produce described effect. 6. That specification claimed as new more than that of which Smith (the patentee) was first inventor.

7. License. 8. Not an invention for which patent could lawfully issue.

Issue.

The case was tried at Brantford, before J. Wilson, J.

Letters patent were proved, dated 6th December, 1854, to James B. Smith. It was described as "a new and useful improvement in the construction of portable or stationary steam or water saw-mills."

A drawing was attached to the specification. The latter explained it thus: "A. a steam engine; B. connecting rod or shaft, attached to crank pin C; crank N is attached to one end of shaft D, with the saw E on the opposite end of the same shaft;" further describing various other parts of the machinery, and that if, instead of steam, water power were used to move an upright shaft or rod B, driving a spur wheel acting on a pinion placed on the main shaft or saw maundril D, the same result would be obtained."

"What I claim as my invention and desire to secure by letters patent, is, generally, the simplicity of construction of the saw-mill and making it portable, but specially the direct application of steam or water power by the connecting rod or shaft B to drive the circular saw."

On behalf of plaintiff it was proved that apparently his plan was the first in which the direct application of the motive power was made to drive circular saws, placing the circular saw at the end of the shaft to which the motive power was directly applied, thereby saving the use of the belts and pulleys, by which the second shaft, to which the saw had been attached, was turned, and discontinuing that shaft also; that it effected a saving in cost of about \$200; that there was a saving of power, &c., &c.; that the direct action plan had been applied to other machinery; that locomotives were made on the direct action plan.

For the defence it was objected that the invention was not one for which a patent ought to issue; that the specification was bad, as claiming three things, 1st. Simplicity; 2nd. Portability; 3rd. The direct application, and did not distinguish between what was new and old, and merely

claimed a new application of an old invention ; that portability was not the subject of a patent, neither size nor weight being given.

Leave was reserved to enter a nonsuit on these objections.

Thomas Wilson, foreman in one Gartshore's foundry, at Dundas, swore that twenty years ago he had connected a steam engine direct to the gabe of a saw, and also connected the percussion wheel to a saw on the direct action plan ; that they had connected locomotives with the shaft of the wheel on the direct plan ; that all the engines in the steamer "Peerless" were on this plan, while other steamboat engines on the old plan were so constructed, so to a trip hammer ; that direct action was applied on all machines where there were no intermediate connections ; that over twenty years ago direct action was in use ; that portability in a machine required that it should be capable of being all moved together ; that he could not tell what was new and old in these specifications ; as applied to a water-wheel they did not describe direct ; the saw put on the engine shaft was new : he had never seen that done before this.

The learned judge left it to the jury to say whether the invention was new, or whether it was a new application of an old invention to the propelling of a circular saw.

The jury found that the plaintiff's invention was a new application of an old invention to the propelling of a circular saw, and found for plaintiff \$1 damages.

In Michaelmas term *B. B. Osler* obtained a rule to enter a nonsuit on the leave reserved, the finding of the jury being equivalent to a verdict for defendant, or for a new trial, for misdirection, in not telling the jury. if it was a new application of an old invention, to find for defendant.

In Hilary Term last, *Harrison*, Q.C., shewed cause, citing *Smith v. Mutchmore*, 11 C. P. 458 ; *Smith v. Powell*, 7 C. P. 332 ; *Smith v. Ball*, 21 U. C. 122 ; *Emery v. Iredale*, 11 C. P. 106 ; *Spencer v. Jack*, 11 L. T. N. S. 242 ; *Merrill*

v. Cousins, 26 U. C. 49; *Brooke v. Aston*, 8 E. & B. 478; *Harwood v. Great Northern Railway Co.*, 2 B. & S. 194; *Penn v. Bibby*, L. R. 2 Ch. App. Ca. 127; *Daw v. Eley*, L. R. 3 Eq. Ca. 416.

Moss, contra, cited *Winter v. Wells*, 1 C. M. & R. 505; *Winter v. Mower*, 6 A. & E. 735; *Brunton v. Hawkes*, 4 B. & Ad. 550, 556, 557; *Kay v. Marshall*, 5 B. N. C. 492, 499; *Harwood v. Great Northern Railway Co.*, 11 H. L. Ca. 654.

HAGARTY, C. J., delivered the judgment of the court.

This patent has been several times before the court. *Smith* (original patentee) *v. Powell* (7 C. P. 332) only raised the question of infringement, on not guilty.

Smith v. Mutchmore (11 C. P. 458) was tried before Draper, C. J., and plaintiff was nonsuited, the learned judge holding that the invention was not new, and that plaintiff had failed to describe what he had intended to claim as his discovery. A new trial was ordered, the court holding that the jury should be asked their opinion on the novelty and usefulness of the invention. There was no plea objecting to the specification.

Smith v. Ball, tried before the same learned judge, with the same result, was before the Queen's Bench, in 21 U. C. 123, when a new trial was ordered. The court considered the specification sufficiently shews what the plaintiff claimed as his invention, viz., the direct application of steam or water power by the connecting rod or shaft B to drive a circular saw, and that, although the direct application of the power by the connecting rod or shaft was no new invention, yet, read with the following words, shew the claim to be for driving the saw by such direct application; and the Chief Justice adds, "the evidence seems to us to afford ground for claiming that direct mode of application of the steam power to the purpose of driving the circular saw as a new invention." There was no plea attacking the specification. The evidence was the same in each case, and it is said in the statement common to each

case, "There was no novelty in the direct application of the power to the shaft, nor any novelty in the placing of the circular saw on the end of the shaft; but the real novelty or improvement was placing the circular saw on the end of the shaft, to which the motive power was directly applied, thereby saving the use of the belt and pulleys by which the second shaft, to which the saw had been attached, was turned, and also rendering the shaft unnecessary."

I think, after the strong expressions of opinion as to sufficiency of the specification in the Queen's Bench, and the apparent inclination to the same view in the Common Pleas, we may hold the objections now urged thereto as not entitled to prevail. On this point I refer to the language of Williams, J., delivering the judgment of the Court of Error, in *Lister v. Leather* (8 E. & B. 104), and Erle, C. J., in *Oxley v. Holden* (8 C. B. N. S., at page 705.) I do not, however, consider that the views expressed on setting aside the nonsuits bind us on the main point of the case presented to us directly on the evidence and finding of the jury.

If I had to look at this case without reference to the many decisions in the books, I should at once decide against the validity of this patent. There was no novelty in the application of the motive power direct to the shaft, nor any novelty in placing a circular saw on the end of a shaft. A mechanic sees two shafts working parallel to each other, the power applied to one from which belts and pulleys pass to and communicate the motion of one shaft to the other, on which is the saw. He asks himself why this waste of power, and why one shaft cannot answer the same purpose more directly and simply. Whatever the decisions may be, it may well be regretted if the law should permit the monopoly of the right to make a change of that character to any one person.

Beyond the costs of the suit our decision can apparently be of little moment to the parties. The fourteen years, for which the patent was granted, expired shortly after the

trial, and the damages were nominal. It seems distinctly laid down that the simplification of machinery, by which a cheaper, more portable and easier managed machine is obtained for a useful purpose than formerly existed, is the subject of a valid patent. The actual improvement should be novel and useful: *Smith v. Mutchmore*, *supra*. The cases usually cited in support of this position are *Minter v. Mower* (6 A. & E. 735) and *Russell v. Cowley* (1 C. M. & R. 864.) The first was for a chair with a self-adjusting leverage, affecting the seat and back. A prior inventor had discovered the principle. By the use of a more complicated machinery the plaintiff had simplified it and made it more readily useful. He failed from a defective specification claiming too much. Lord Denman says, "We are far from thinking that the patentee might not have established his title, by shewing that a part of Brown's chair could have effected that for which the whole was designed."

Russell v. Cowley was for an improvement in making tubes for gas, &c., drawing them through fixed dies without the use of a maundril which had been used previously. Lord Lyndhurst, C. B., says, "Without any question this invention is ingenious and useful, and the point upon which the validity of the patent depends is, whether it claims to manufacture the pipes without the use of the maundril, in which case it would be a new invention." The maundril was used for internal support against external pressure. The tubes could thus be made of greater length. They were passed through a circular die. It was spoken of as "an ingenious and useful invention."

In *Spencer v. Jack* (11 L. T. N. S. 242) Lord Westbury says, "It is impossible to deny that if there be a combination of several things previously well known, which combination is attended with results of such utility and advantage to the public that the combination itself is rightfully denominated a substantial improvement, it is, I say, impossible to shew that it is not the subject of a patent."

In *Ralston v. Smith* (13 L. T. N. S.) the same high authority says, "The word 'manufacture,' by the large interpretation given to it, not only comprehends productions, but also the means of producing them. Therefore, in addition to the thing produced, it will comprehend a new machine or a new combination of machinery; it will comprehend a new process or an improvement of an old process." Lord Cranworth says, "It is not every useful discovery that can be made the subject of a patent, but you must shew that the discovery can be brought within a fair extension of the words, 'a new manufacture.'"

In *Harwood v. Great Northern Railway Co.* (11 H. L. 654, also 3 B. & S., Amn. Edn. 998) Lord Westbury says, "No sounder or more wholesome doctrine was ever established than that established by the decisions of the four learned judges who concur in the second opinion delivered to your lordships, namely, that you cannot have a patent for a well known mechanical instrument merely when it is applied in a manner or to a purpose which is not quite the same, but is analagous to the manner or the purpose in which or to which it has been hitherto notoriously used."

In *Booth v. Kennard* (1 H. & N. 527) a patent was sustained for obtaining gas from seeds, though the process of obtaining gas from the oil pressed from such seeds had been previously well known. The saving of one or two processes was held to be a useful invention.

So in the madder case, *Steiner v. Heald* (6 Ex. 607), a known process applied to fresh madder was by plaintiff applied to spent madder, which before had been thrown away, but which was thereby rendered valuable; it was held that the judge was wrong in treating the conclusion from the evidence as matter of law on the issue that it was not a new manufacture as alleged, nor a matter for which a patent could be granted, and that it should have been left to the jury. They said, "If the patent be good, it must be on account of the old contrivance being applied to a new object under such circumstances as to support a

patent;" that spent madder might be a different thing from fresh madder; the only difference might be that part of the colouring matter had been already extracted," &c.

In *Horton v. Maybon* (12 C. B. N. S. 437) Willes, J., says: "No doubt a new combination of old machinery or instruments, whereby a new and useful result is attained, may be the subject of a patent; but there must be some invention: there is none here. By making a thing in one piece, instead of, as before, uniting several pieces together, the patentee no doubt effects a considerable saving of labour and expense. The merit is due to the person who first produced the article called double angle iron. That is old and well known and has long been applied to circumstances not dissimilar to that to which the present plaintiff applies it. The mere fact of its application to gas-holders, rendering their construction better or cheaper, does not constitute a subject matter for a patent." Erle, C. J.: "He informs the manufacturers of gas-holders that, by the use of an article well known in the iron trade, much labor and expense may be spared. That clearly is not the subject of a patent." The case was affirmed in error (16 C. B. N. S. 141). Similar language is used in *Ormson v. Clarke* (13 C. B. N. S. 337). The patent was for an improvement in the manufacture of cast tubular boilers, which consisted in casting the whole in one piece, and which the jury found to be useful and beneficial to the public: Held, not the subject of a patent.

Penn v. Bibby (L. R. 2 Chan. App. 127) was a case of a patent for an improvement in employing wood in constructing the bearings and bushes for the shafts of screw and submerged propellers. It was objected that the alleged invention was merely a new application of an old and well-known thing. The only examples of the previous use of modern bearings were in grindstones and water-wheels. Wood, V. C., to whom, without a jury, certain questions had been

NOTE.—Our statute says, "any new and useful improvement on any art, machine, manufacture or composition of matter, &c.": Con. Stat. Can. ch. 34, sec. 3.

left to find under an order of the court, by consent, had found all in favor of plaintiff, including one whether it was a proper subject for a patent. A new trial was moved for before Chelmsford, L. C. He said, in dealing with this finding of the Vice Chancellor upon the question of fact, he considered himself precisely in the situation of the judges of courts of common law, when a rule is asked against the finding of a jury, and that he had never known an instance where there was evidence on both sides, and the judge who tried it was satisfied with the verdict, a new trial had been granted; that it was very difficult to extract any principle from the various decisions as to the new application of an old well-known thing. He approves of Sir A. Cockburn's language, in *Harwood v. Great Northern Railway Company* (2 B. & S. 208): "The question in every case is one of degree, whether the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same, and that determines whether the invention is sufficiently meritorious to be deserving of a patent." Lord Chelmsford adds, "In every case of this description, one main consideration seems to be whether the new application lies so much out of the track of the former as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study." The evidence shewed the great success and general adoption of plaintiff's method; a screw propeller revolving at 120 per minute, the metal bearing soon wore out from the friction; yet plaintiff's wooden bearings continued serviceable for some years without repairs. The admiralty and mercantile marine and over fifty firms paid royalties for their use.

The Chancellor adds, "Strictly applying this test, which cannot be considered an unfair one to the present case, it appears to me impossible to say that this invention is merely an application of an old thing to a new purpose.

In *White v. Jones* (37 L. J. Chy. 204) Malins, V. C.: "The inclination of modern law is to restrict rather than to enlarge the operation of the patent laws, and the right has

been so much abused that it has become absolutely necessary to put some restraint on the inconvenience which the public and the trade have suffered by the number of existing patents, so that the protection of these laws shall only be given to those who really invent something that is for the public benefit. * * This is merely an improved mode of manufacture, which cannot be the subject of a patent. * * There is no invention in it." *Jordan v. Moore* (L. R. 1 C. P. 624) is also in point on the general question.

From the cases which I have noticed, extracted from a large number bearing more or less upon the question, some idea may be formed of the general law; but it is most difficult, if not impossible, to extract any clear rule of universal application.

In the case before us the patentee certainly discovered no new principle. It was an old invention to make a shaft revolve rapidly by steam or water power directly applied to it. It was an old idea to fix a circular saw on the end of a revolving shaft. The old plan was to communicate the motion from the one shaft to the other by belts and pulleys.

Applying Lord Chelmsford's test, would not the dispensing with one shaft "naturally suggest itself to a person turning his mind to the subject," or would it "require some application of thought and study?"

If the patentee here had invented or provided any new machinery or matter of any kind, the use of which enabled him to dispense with the second shaft and the apparatus of belts and pulleys, I could well understand his being entitled to a patent for the production of an improved and simplified saw-mill, effecting an important saving of labor and expense; but he has, as far as I can understand the claim, merely suggested that the saw should be placed on the end of the same shaft to which the power was applied. The language of Sir Wm. Erle, already quoted, might apply: "He informs the manufacturers of gas holders that, by the use of an article well known in the iron trade, much labor and expense may be spared. That clearly is not the subject of a patent."

Here we may say, "He informs the makers of circular saw mills that, by transferring the saw to the first shaft from the second shaft, much labor and expense may be spared, and the second shaft and its belts and pulleys dispensed with." Can this, any more than the other, be the subject of a patent?

Every machinist and millwright must have known that if the saw were placed on the end of the first revolving shaft, it could be driven at least as rapidly as if the motion came previously to one, two, or more shafts.

I cannot gather from the claim what, if any, difficulty the patentee had to overcome to effect what he claims as his improvement.

As far as we can see from his statements, the thing could always have been done with the same known mechanical appliances.

On the evidence before us it seems to me contrary to the general principles of patent-law to allow to plaintiff the monopoly of the right to put a circular saw on the end of a shaft turned directly by the motive power. As Willes, J., says, "There must be some invention." It is clear from the cases that the saving of labour and expense and the producing of a successful result cannot alone support a patent.

I think the case most in plaintiff's favour, *Russell v. Cowley*, is clearly distinguishable. There was "invention" there most certainly, and a better and different article produced.

The other case, *Minter v. Mower* (6 A. & E. 735), broke down on the specifications. The language of Lord Denman, already cited, was not necessary for the purposes of the judgment. The jury found there was a prior inventor, who had found out the principle of producing the equilibrium by a self-adjusting leverage, but not the practical purpose to which it was afterwards applied, and that the plaintiff made that discovery.

It is quite possible that Lord Denman's words, read in the light of many subsequent cases, may be too wide in expression.

When the same patent was upheld in the prior case of *Minter v. Wells* (1 C. M. & R. 505), before Lord Lyndhurst, there was no evidence of the prior invention.

A very careful examination of the report of *Minter v. Mower* induces me to question its warranting the language quoted in *Smith v. Mutchmore*, as applied to it by the text writers Lund and Norman.

In *Hindmarch* on Patents, page 96, it is said: "The observation made by Lord Abinger in *Lash v. Hague*, "that it is a different thing when you take out a patent for applying a new contrivance to an old object, and applying an old contrivance to a new object," is most important, and shews what the law requires is, *that the act or contrivance, which is the subject of the privilege, must be new*, and that it is not sufficient that the object or application of a contrivance is new, if the contrivance itself be old;" and see note F. Webster 208, on same case.

If a patent had been obtained for the old circular saw mill, with its belts and pullies, by one who had discovered the principle of cutting with the circular saw on a revolving shaft, would the plaintiff's mill, as patented by him, be an infringement? In *Jupe v. Pratt*, Webster P. C., 146, after noticing that there cannot be a patent for a mere scientific principle, Alderson, B., says, "You must start with having invented some mode of carrying the principle into effect. If you have done that then you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as piracy of your original invention." The learned judge was referring to a curious case, *Crossley v. Beverley* (9 B. & C. 63), but more fully reported in Webster, 106.

In any view of the case I think it would be impossible to support the verdict for plaintiff, as endorsed on the record, "that plaintiff's invention is a new application of an old invention to the propelling of a circular saw mill," on a direction to them to enquire whether the invention was new, or whether it was a new application of an old invention to propel a circular saw. If this were the proper issue

to leave to them, I think their answer amounts to a verdict for defendant.

It does not seem that the learned judge was asked to leave to the jury the question of novelty or usefulness. Both parties seem to have acquiesced in its being left as it was to the jury.

It remains to consider whether the rule should be made absolute to enter a nonsuit, or whether we should not send the case down to another trial, where the proper questions would be submitted to the jury.

I hardly think that on the plaintiff's evidence alone the learned judge should have directed a nonsuit, and the motion was not renewed at the close of defendant's evidence; nor does it appear that when verdict was rendered, it was objected that the finding amounted to a verdict for defendant. The learned judge, after charging the jury, was compelled to leave, and the verdict was recorded by the county judge.

● Under all the circumstances I think there should be a new trial without costs, unless the parties consent to the entry of a *stet processus*, which, especially as the patent has expired, we should advise being done.

GALT, J., took no part in the judgment; the case having been argued before his appointment to the bench.

VANNORMAN v. McCARTY.

Equity of redemption—Sale of portion—Garnishment execution at suit of creditor of mortgagee.

Held, following, *Heward v. Wolfenden*, 14 Grant, 188, that it is *the whole* estate termed *the* equity of redemption in the mortgaged premises, when *that* estate is the property of the person against whom or against whose executors or administrators the judgment upon which the execution issued was obtained, and not *an interest in* or *parcel of* the estate, of which the statute 27 Vic. ch. 13 authorizes the sale.

Seemle, that an equity of redemption in mortgaged premises cannot be sold upon a *garnishment* execution sued out against a mortgagor, *in respect of the mortgage debt*, at the suit of a creditor of the mortgagee.

Quære, per Gwynne, J., whether an equity of redemption can be sold upon an execution, issued upon a judgment recovered at the suit of the mortgagee, in an action upon the covenant contained in the mortgage for payment of the mortgage debt.

EJECTMENT for the N. E. 40 acres of lot 15 in 9th concession of Blenheim, County of Norfolk, tried at the last spring assizes, at Woodstock, before Hagarty, C. J.

The facts of the case, material to this report, were, that plaintiff had a judgment against one Muma, who held a mortgage from defendant over 50 acres of the same lot; that three creditors of Muma had obtained garnishment orders upon the defendant to pay to them respectively several parts of the mortgage debt, under executions, upon which orders defendant's interest in 40 acres of the land in question was sold, and was bought by plaintiff.

Among several other objections taken by defendant, at the trial, was one that the sheriff should have sold defendant's interest *in the whole* 50 acres, and not in a portion only.

Leave was reserved to move on this as well as on the other grounds taken, and a verdict was found for plaintiff.

In Easter term last, *S. Richards*, Q.C., obtained a rule *nisi* accordingly, to which *M. C. Cameron*, Q.C., now shewed cause, referring to secs, 257, 258, 259, C. L. P. Act, C. S. U. C. ch. 22.

Richards, contra, cited *Brough v. Bank of Upper Canada*, 2 Err. & App. Rs. 95; *Farr v. Robins*, 12 C. P.

35; *Jacomb v. Henry*, 13 C. P. 377; *Ontario Bank v. Kerby*, 16 C. P. 35; *Oswald v. Rykert*, 22 U. C. 306, C. S. U. C. ch. 22, secs. 296, 252, ch. 19, sec. 143.

GWYNNE, J.—In the view which I take it is quite unnecessary to refer to any but one of the numerous objections taken to the plaintiff's right of recovery in this action, namely, that it is not competent for a sheriff, under an execution at law against the lands and tenements of a mortgagor, to sell the equity of redemption of the mortgagor in a portion only of the lands mortgaged.

The Court of Appeal, in *The Bank of Upper Canada v. Brough*, 2 Er. & Ap. Rep. 95, decided that 22 Vic. cap. 22, sec. 257, only authorized the sale of the equity of redemption in the mortgaged premises on a judgment recovered against *the mortgagor* and on an execution against *his* land and tenements.

The statute 27th Vic. ch. 13 was then passed for the purpose, as its preamble shews, of declaring the meaning of the 257th, 258th, and 259th sections of 22 Vic. ch. 22, and that act directed that whenever the word "mortgagor" occurs in these sections it shall be read and construed as if the words "his heirs, executors, administrators or assigns, or person having the equity of redemption," were inserted immediately after such word "mortgagor." I do not exactly see what light the words "heirs" and "assigns," coupled with "executors" and "administrators," give to aid the construction of the sections alluded to; for the heir of the mortgagor *could* only be liable in respect of the specialty debts of his ancestor where he has lands by descent, and *Rymal v. Ashberry et al.* (12 C. P. 339) decides that an equity of redemption is not such assets. From that case, also, it would seem that in this country the heir cannot in any case be sued for specialty debts of his ancestor, and the assignee of the equity of redemption could in no form of action be sued *qua* assignee. However, the residue of the 1st sec. of 27 Vic. ch. 13 does, in very clear terms, shew what the legislature has declared to be the meaning

of sec. 257 of 22 Vic., namely, that "the equity of redemption in any freehold mortgage of real estate shall be saleable under an execution at law against the lands and tenements of *the owner of such* equity of redemption in *his* lifetime, or in the hands of his executors or administration after his death, *subject to such mortgage*."

The plain construction, then, of the 257th sec. of 22 Vic. is, that it is "*the equity* of redemption in the mortgaged premises," that is, the *whole estate* known in courts of equity as "the equity of redemption," which *alone* may be sold upon a judgment against the *owner thereof*, and not that that estate may be divided into, and sold in, parcels, thereby creating complications embarrassing to a court of equity in its dealings with this creature of its own creation. Accordingly, in *Heward v. Wolfenden*, (14 Grant, 190), the late learned Chancellor has decided that under the above statutes the sheriff, upon an execution against the lands and tenements of the mortgagor, *must* sell the equity of redemption *in all* the mortgaged lands, *or not sell at all*.

The learned Chancellor, in his judgment in that case, gives certain illustrations of what he terms the absurdity and difficulty of any other construction.

To the soundness of that judgment I cheerfully yield my most unqualified adhesion. Indeed, many illustrations might be added to those suggested by the learned Chancellor. I venture to submit one. A mortgagor, being seised of the equity of redemption in mortgaged premises, subject to a mortgage, which provides for the payment of the mortgage debt by ten annual instalments, with interest, before the first instalment becomes due, executes deeds of bargain and sale of half of the mortgaged premises, in ten separate parcels, to ten distinct purchasers. The operation of those deeds is merely to transfer *an interest* in the equity of redemption to the several purchasers, and to impose a necessity upon the mortgagee, if he should file a bill of foreclosure, to bring *them all*, as well as the mortgagor, before the court. Now, assume that the consideration, or part of the consideration, for which these several deeds

were executed, was that each purchaser should pay *to the mortgagee* an instalment of the mortgage debt, in the order of those instalments becoming due, until the whole mortgage debt should be paid, whereby the *mortgagor* should have half of the mortgaged premises reserved to himself freed from the mortgage debt; then, assume some of these instalments to be duly paid as they became due, and that the *mortgagee*, not being bound so to do, had not released any of the portions purported to be conveyed by the mortgagor to the purchasers who had paid their instalments, as agreed upon, and that the other purchasers had made default in payment of *their* instalments; the mortgagor, in this case, seeking to foreclose, must bring before the court *all* the vendees from the mortgagor, both those who had paid and those who had not paid, and the mortgagor himself, as all together *interested* in the single estate termed *the equity of redemption*; but in such case the mortgagor and his vendees have separate and distinct rights and interests between themselves, with which a court of equity can alone deal. Now, if the equity of redemption of the mortgagor in that half of the premises which, as suggested, the mortgagor contemplated reserving for himself, relieved of the mortgage debt, could he sold under the statute, then, if that sale should prevail, the purchaser of that equity of redemption, if (as the statute says,) "the same rights shall be vested in him as the mortgagor would have had if such sale had not taken place," would be entitled to call upon the vendees of the several parcels of the other half of the premises, who had not paid their several instalments of the mortgage agreed to be paid by them, to pay these instalments, and so to acquire half of the mortgaged premises freed and absolutely discharged of all liability to pay any part of the mortgaged debt, and so, under the colour of a sale of an equity of redemption, would pass the right to enforce specific performance against the defaulting vendees from the mortgagor. The statute clearly never contemplated that a sale under it should pass such rights: it expressly provides that the sale which *it* authorizes shall

pass to the purchaser the liability of paying off the mortgage debt in full; but, if that liability should attach upon the purchaser of the equity of redemption in that part which the mortgagor, by his agreement with his vendees (if these agreements should be specifically performed), had contemplated securing to himself, relieved of the mortgage debt, what then would become of *his* equitable rights against these vendees? Can it be said that those rights are sufficiently protected by reserving to him the right of recovering to his own use those instalments so specially appropriated for the protection of *his* half, after he had been deprived, by process of law, of that half and of the equities which a court of equity would have administered to him in such a case? Upon principle, then, and upon the letter of the statute 27th Vic. ch. 13, it seems to me to be very clear that what the statute has alone authorized to be sold under an execution at law is *that single* estate termed the equity of redemption in the mortgaged premises, when *that* estate is the property of the person against whom, or against whose executors or administrators, the judgment, upon which the execution issued, was obtained: *that estate*, and not *an interest in* that estate or *a parcel of* that estate, is what the statute authorizes the sale of.

But there is a further fatal objection to the success of the plaintiff in this action, not, it is true, mentioned in the argument, but still, in my judgment, irremediably fatal, namely, that the provisions of the statute are totally inconsistent with the possible existence of the right to sell an equity of redemption in mortgaged premises upon a *garnishment* execution sued out against a mortgagor, *in respect of the mortgage debt*, at the suit of a creditor of the mortgagee. The present case affords an apt illustration of the impossibility of executing garnishment process upon such an estate. Three garnishment executions have issued at the suit of three several creditors of the mortgagee, *for the purpose of realizing payment of the mortgage debt to themselves instead of to the mortgagee*. Professing to attain this purpose the

sheriff, in virtue of one or all of these executions, has assumed to sell and convey the equity of redemption in the mortgaged premises. He has realized from the sale \$35. The sum so realised forms no part, nor can it represent any part, of the mortgage debt. The 27 Vic. ch. 13 says distinctly that the sale which the statute authorizes shall be a sale *subject to the mortgage*. The amount, therefore, which has been realized by the sheriff, if the sale were valid, should of right be paid over *to the mortgagor*, as the value of his estate in excess of the mortgage, leaving the *purchaser*, as contemplated by the statute, to pay the mortgage debt; but the statute gives no process against the purchaser to enforce payment of that debt, except at the suit of the mortgagor, in the event of his being compelled by the mortgagee, notwithstanding the sale, to pay the mortgage debt out of other property. The effect then of the executing the garnishment process upon the equity of redemption would be, to realise a sum of money not *part of* but in *excess* of the mortgage debt, not payable to the person suing out the execution, under which it was levied, but to the defendant in the action against whose estate the writ had issued, and to transfer the liability to pay the mortgage debt, to levy which the writ issued, to another person, namely, the purchaser of the equity of redemption, against whom the creditors of the garnishee can have no process; to defeat, in fact, and not to enforce the remedy, for the enforcing of which the writ issued.

For myself, I confess I have always entertained and still do entertain doubts that, consistently with the provisions of the statute, the equity of redemption can be sold upon an execution at law issued upon a judgment recovered at the suit of the mortgagee, in an action upon the covenant, contained in the mortgage, for payment of the mortgage debt. There has always appeared to me to be something so inconsistent, as to be impracticable, in the law permitting money to be levied under an execution issued upon a judgment, which money is not payable to the judgment creditor; while the operation of the sale, by means of

which it was levied, is to nullify the judgment without satisfying it, leaving the judgment creditor a mortgagee still, but stripped, by his own act, of the benefit of the covenant contained in his mortgage, and of the judgment which he had recovered thereon. A case like this could readily be suggested wherein the mortgagee, placed in a worse position than he had been before he brought his action at law, would be compelled after all to have recourse to a court of equity to permit him to foreclose the equity of redemption against the purchaser under the execution issued upon his judgment, as the only means of extricating himself from the embarrassing position in which he had placed himself by the mode which he had adopted of enforcing his judgment. The words in the 259th sec. "*being or not being plaintiff*," &c., may receive a construction quite consistent with the provisions of the act, if they should be limited in their application to the case of the mortgagee recovering a judgment against the mortgagor *in respect of a matter other than the mortgage debt*, and so the anomalies and contradictions I have suggested may be avoided.

HAGARTY, C. J.—It appeared in evidence, and was admitted on the argument, that while defendant's equity of redemption was in 50 acres, only 40 acres thereof were sold on plaintiff's execution. I think we should follow the decision in 14 Grant, *Heward v. Wolfenden*, and hold that this cannot be done.

But an objection pointed out by my brother Gwynne seems difficult to answer. Can the equity of redemption of McCarty be sold, on a garnishment order, by a judgment creditor of his mortgagee?

Suppose McCarty owed Muma on the mortgage £100, and Vannorman had a judgment against Muma for about that sum; if McCarty's estate be sold for, say £100, which is paid to Vannorman, the statute says that Muma's debt to Vannorman is satisfied thereby. Therefore, Muma is paid and his claim on McCarty on the mortgage is at an end; but McCarty's whole estate is sold.

It is his right to redeem Muma; his interest over and above the mortgage that realizes the sum obtained by the sheriff. The statute (sec. 258) says, the purchaser, *i. e.*, Vannorman, shall have the same rights the mortgagor had, and may pay off the mortgage which remains unpaid.

But Vannorman may perhaps say that under the garnishment process he stands in Muma's place and buys as Muma, the mortgagee, might have bought under sec. 259. If he do so he has to realize the mortgage debt; but this very debt is what has been garnished. I hardly see how a result so absurd can be legally arrived at.

I wish to be understood as expressing no opinion on the last point in my brother Gwynne's judgment, or throwing any doubt upon an application of the statute which has prevailed for many years and on which probably very many titles depend. It was not raised before us in argument.

GALT, J., concurred with Hagarty, C.J.

Per Curiam.—*Rule absolute to enter nonsuit.*

CORPORATION OF FRONTENAC V. CORPORATION OF KINGSTON.

Jurors' expenses—Arrears due by city for several years—County no right to recover.

It is the duty of the county, under the act relating to jurors, each year to ascertain and demand from the city its proportion of the jury expenses for that year, and unless this is done the accumulated arrears of several years, during which there has been an omission by the county to ascertain and demand any sum, cannot be recovered.

18 Vic. cap. 100 was not repealed by 22 Vic. cap. 100, but the provisions of the former act were thereby imported into one Consolidated Act relating to juries.

Quære, as to the proper party to sue in the case of assets belonging to a union of counties and to recover which no suit is brought till after the dissolution of the union.

THIS was an action of debt, brought by the municipal corporation of the county of Frontenac against the muni-

cipal corporation of the city of Kingston, to recover from the latter corporation several sums of money, claimed to be due for the proportion of the jury expenses alleged to be due and payable from the city of Kingston to the county of Frontenac for the several years elapsing between the years 1855 and 1867, including both of those years.

The declaration contained four counts.

The first count, after reciting the 18th Vic. ch. 180, that from thence until the passing of the act 23rd Vic. ch. 39, the counties of Frontenac, Lenox, and Addington were a union of counties, of which union the city of Kingston formed a part for judicial purposes, further averred that by the 23rd Vic. ch. 39, the counties of Lenox and Addington were incorporated into one county and were declared to be the junior of the two united counties of Frontenac and Lenox and Addington, instead of those counties forming a union of three counties as formerly.

The count then averred that by a proclamation duly issued on 20th day of September, 1864, it was declared that from the 1st of September, 1865, the union between the county of Lenox and Addington and the county of Frontenac should be dissolved, and that the same was from the said 1st day of January, 1865, dissolved accordingly, and that upon such dissolution the assets in the first count mentioned, that is to say, the sums of money thereby sought to be recovered from the city of Kingston, became, by agreement between the county of Frontenac and the county of Lenox and Addington, the property of the county of Frontenac, the senior county of the union. The count then alleged that the expenses incurred by the union in existence to the year 1855, that is, the union of the united counties, for the payment of jurors, were, to wit, the sum of \$2017.60, and in the year 1856 the sum of \$3818.50, and in 1857 the sum of \$4392.60, and in 1858 the sum of \$3551.35, and in 1859, that is to say, until the passing of the act 23 Vic. ch. 39, the sum of \$4017.47, making in the aggregate for the said years the sum of \$17,797.17. The count then averred that the portion of the said expenses for the payment of jurors, for

which the city of Kingston was liable to the union under the said act, 18 Vic. ch. 130, determined as in the said act provided, and comparing the value of ratable property in the city and county, as in the said act provided, according to the assessment rolls of each, for the year 1855, was the sum of \$217, for the year 1856 the sum of \$846, for the year 1857 the sum of \$982, for the year 1858 the sum of \$674, and for the year 1859 the sum of \$838, making in the aggregate the sum of \$3557.

The count concluded by averring that the defendants had not paid to the said union, or to the plaintiffs, the senior county thereof, the said several sums of money or any of them, or any part of them, although duly demanded, but had wholly neglected, &c., whereupon, &c.

In the second count, after similar recitals and averments, down to the averment of the dissolution of the union, and that the assets by the second count sought to be recovered, were by agreement between the counties upon such dissolution, made the property of the county of Frontenac, proceeded to claim for the years intervening between the time that the counties of Lenox and Addington were incorporated into one county, as the junior county of the union, and the ultimate dissolution in 1865, averring that the expenses incurred by the union for the payment of jurors for the period were, &c., and then setting out the portion of the said expenses for the payment of jurors for which the city of Kingston was liable under the act, with an averment of non-payment.

The third count, after reciting Con. Stat. U. C. ch. 31, averred that during the years thereafter mentioned the city of Kingston, withdrawn from the jurisdiction of the county council, formed part of the county of Frontenac for judicial purposes. The count then averred that the expenses incurred by the county of Frontenac (not saying for the payment of jurors) was, &c., and that the portion of the said expenses for the payment of jurors, for which the city of Kingston was liable to the county of Frontenac, under Consol. Stat. U. C. ch. 31, determined as in said act pro-

vided, according to the assessment rolls for each year, was, &c., with averment of non-payment.

The fourth count, after reciting Consol. Stat. U. C. ch. 31, and that under the operation of the Assessment Act of Upper Canada the distinction before then existing between actual value in rural municipalities and annual value in cities and towns ceased to exist, and that therefore in all municipalities assessments were required to be made on actual value and rates collected at so much in the dollar upon the actual value of real and personal property liable to assessment therein, averred that the expenses incurred by the plaintiffs during the year 1867 for the payment of jurors was a large sum, to wit, &c., and that the portion of such expenses, for which defendants were liable to plaintiffs under said act, determined as in said act provided, was a large sum, to wit, &c., which sum became and was payable to plaintiffs' municipality after the close of the year 1867, with averrment of non-payment, whereupon, &c.

DEMURRER to whole declaration :

1. Mis-joinder of counts and parties, in this, that causes of action in first and second counts, and those in third and fourth counts, not by and against same parties and in same rights ; in some the plaintiffs suing in own right, and in others as representing other corporations and parties to record.

2. No right of action intended to be given in respect of sums claimed, but only that upon amount being determined in each year, if not paid out of fund for general municipal purposes, assessment might be enforced at instance of county.

Separate causes of demurrer to first count :

1. Cause of action therein accrued to united counties of Frontenac, Lenox and Addington, and should have been brought in name of that united corporation, assets in question not being, as intended, such as were assignable by statute, and alleged assignment thereof therefore inoperative ; and even if alleged assets assignable, yet, being a chose in action, right to sue for them not vested in plaintiffs alone.

2. The act of parliament, under which causes of action, in first count alleged, pretended to have accrued, repealed long before present action.

3. No right existed to sue for alleged claims except in year following year of their coming due, as appeared from provisions of statute respecting same, and at all events no such right of action existed six years thereafter.

4. Not shewn any determination made annually of various sums claimed.

5. Not shewn any proper settlement or determination, as required by statute, of alleged claims, or that defendants were any parties to said settlement and determination.

6. Not shewn any proper demand of sums claimed in each year as accrued, or any demand, such as contemplated by statute, annually or otherwise.

7. Not apparent what was assessed actual and annual value of ratable properties in respective municipalities, by comparison of which jury expenses were to be apportioned nor when nor by whom apportionment made.

8. Not averred that defendants had notice of alleged agreement of assignment of assets between counties on dissolution, nor that sums claimed had not been paid to counties of Lenox and Addington or one of them.

9. Interest claimed not warranted by statute.

The causes of demurrer to second count were same as those to first count, except first, which insisted that liability of defendants, if any, by action was to united corporation of Frontenac and Lenox and Addington, in the name of which corporation, as plaintiffs, any action for causes of action in second count alleged should have been brought.

The causes of demurrer to third count same as those numbered three, four, five, six, seven, and nine to first count, and further that it did not appear that, in arriving at amount claimed, allowance was made for sums which the statute required to be deducted from total sum expended for payment of jurors.

The causes of demurrer to fourth count same as those numbered five, six and seven to first count, the additional

one assigned to the third count, and further that method of determining portion of jury expenses, as set forth, not lawful method, provisions of Juror's Act not being changed or affected, nor rights of cities and counties, as to jury expenses, altered by new assessment act; and further, that if county had taken all necessary preliminary steps to entitle them to sums claimed in fourth count, and not paid, remedy contemplated by statute was that amount should be raised by assessment, and application of county should be by way of mandamus.

Second plea, that the said several sums claimed were not duly demanded before action brought.

Fourth plea, to first and second counts, that said assets were not assigned to said plaintiffs.

Seventh plea to first, second and third counts, that said several sums in said counts mentioned were not duly determined and demanded by plaintiffs or the corporations they claimed to represent as said sums became determinable and demandable by law, and defendants had no notice of said sums now being claimed until this present year (1868), by reason whereof defendants did not during said several years raise by assessment, or otherwise provide, the sums requisite in each year for payment of said sums claimed as aforesaid, and defendants had not at said several times aforesaid, and had not at the bringing of this action, or hitherto, any moneys belonging to them and applicable to municipal purposes generally, to pay same or set apart for and applicable to payment of same, and no estimate or provision had been or was made for payment of same, and defendants had no means to pay such sums claimed without levying a retrospective rate, and said sums were not within the ordinary expenditure of defendants falling due within this year.

Demurrer to second plea:

1. No demand before action made necessary by any of statutes in plaintiffs' declaration mentioned.

2. No demand before action necessary by act of parliament, or otherwise.

3. Averment of demand in plaintiffs' declaration an immaterial averment, and said plea raised an immaterial issue.

4. Said plea at most an answer to some of counts of plaintiffs' declaration, and yet pleaded to whole declaration. Demurrer to fourth plea.

1. Action maintainable by plaintiffs whether said assets assigned, as alleged, or not.

2. That allegation of assignment of said assets in declaration an immaterial allegation, and said plea traversing said immaterial allegation raised an immaterial issue.

3. Said plea not sufficient answer either to first or second counts of plaintiffs' declaration.

Demurrer to seventh plea :

1. Said plea admitted the debt claimed in the first, second, and third counts, and offered no sufficient excuse for non-payment thereof.

2. Defendants had notice under acts of parliament, in several counts mentioned, of liability to said debt, and no sufficient excuse to say they had no notice of precise sums claimed till present year.

3. Debt one created by act of parliament and an obligation cast upon defendants to pay same, which obligation they could only discharge by payment.

4. If defendants had not during the several years raised by assessment a sum sufficient to pay said debt, it was still their duty by assessment, or otherwise, to do so, when payment of debts being enforced against them.

5. Debt being a valid debt by act of parliament neglect of defendants to provide for its payment no bar to action for its recovery.

Harrison, Q. C., for plaintiffs, cited 18 Vic. ch. 130, 23 Vic. ch. 39, 29 & 30 Vic. ch. 54, secs. 46, 48, 61, 62, 63, 64, 240, ch. 55, secs. 13-17, 22 Vic. ch. 100, sec. 179 ; *Brody v. Bellew*, 6 Ir. L. Rs. 348 ; *Corporation of City of Middlesex v. Corporation of City of London*, 22 U. C. 196 ; *Cork and Bandon Railway Co. v. Goode*, 13 C. B. 826 ; *Shepherd v.*

Hill, 11 Ex. 55; *Miller v. Thompson*, 15 C. P. 186; *Woods v. Reed*, 2 M. & W. 777; *Rex v. Hughes*, 7 B. & C. 714; *Jones v. Johnson*, 5 Ex. 867, 7 Ex. 452; *Secord and the Corporation of Lincoln*, 24 U. C. 142; *Corporation of Lincoln v. Corporation of the Town of Niagara*, 25 U. C. 578.

Agnew & Boyd, contra, cited Con. Stat. U. C. ch. 54, sec. 60, sub-sec. 3, secs. 40, 151, ch. 1, secs. 1, 2, 3, 7, 11, also pp. 1051, 1090, 1053; *McDonald v. McDonell*, 24 U. C. 74; *Rex v. Justices of Flintshire*, 5 B. & Ald. 761; *Harrison's Municipal Act*, sec. 222; *Rex v. Dursley*, 5 A. & E. 10; *Regina v. Read*, 13 Q. B. 524; *Woods v. Reed*, 2 M. & W. 777; *Trustees of Caledon v. Corporation of Caledon*, 12 C. P. 301; *Lush* Pr. 27; *Hob.* 88.

GWYNNE, J.—The statute 18 Vic. ch. 130, after reciting that it is just and right that cities in Upper Canada, which for judicial purposes form part of the counties in which they are situate, should pay a fair proportion of the expenses incurred for the payment of jurors in such counties, enacted that the municipal corporation of any county in Upper Canada, of which any city shall form part, shall be entitled to demand and recover from the municipal corporation of any city, which shall form part of such county for judicial purposes, a portion of the expenses incurred by such county in any year for the payment of jurors, which portion shall be determined as follows: from the total sum expended in the county in any year for the payment of jurors and fees and other disbursements under the act passed in the session held in the fourteenth and fifteenth years of Her Majesty's reign, ch. 14, there shall be deducted the sums paid to jurors for attendance at the court of Quarter Sessions, and the sum actually received by the county in such year for fees and penalties, which under said act are appropriated for the payment of jurors. Of the sum remaining after such deduction the portion to be finally borne by the city and by the county respectively shall be in proportion to the assessed value of all the rata-

ble property in each, and the sum to be finally borne by the city shall be that to be repaid by the municipal corporation thereof to that of the county. In comparing the value of the ratable property in any city and county for the purposes of this act, the assessed annual value shall be held to be ten per cent. of the actual value. The year for the purposes of this act shall be the calendar year, and this act shall have effect from the first day of January, 1855, so far as to enable any county to recover under it the proportion above mentioned of moneys expended for the purposes aforesaid since that day. The actual or annual value of ratable property in a city or county for the purposes of this act shall be that shewn by the assessment rolls of each, *for the year in which the expenses to be divided between them were incurred*, and the portion of such expenses to be finally borne by the city shall be payable to the county immediately after the close of each year. The common council of any city shall have full power, and *they are hereby required*, to raise by assessment any sum of money required by such city for the purposes of this act, *or to pay such sum out of any moneys belonging to the city* and applicable to municipal purposes generally." The act 14 & 15 Vic. ch. 14, which is referred to in the above act, enacted that a fund for the payment of jurors should be formed, 1stly, by the sum of 15s. to the clerk of assize on every record entered for trial and assessment at the assizes, and the sum of 7s. 6d. to the clerks of the county courts with every record entered for trial and assessment at those courts; 2ndly, by the payment, in all criminal cases in which by law the party prosecuting or prosecuted shall be liable to pay the costs of the prosecution, of the sum of 15s. over and above that to which he was by law theretofore liable; and 3rdly, by the amount of all fees and penalties, imposed upon and levied in the several counties of Upper Canada, not payable to the Receiver General, and of all fines upon jurors for non-attendance levied in such county. All these sums were made payable to the treasurer of the county, to form a fund for the payment

of jurors. By sec. 10 it was enacted that if the fund so formed should prove insufficient, the county council should raise such a sum as in their judgment should be sufficient for the purpose. If, after the passing of the act 18 Vic. ch. 130, the fund, without a county rate, should prove in any year to be sufficient for the payment of jurors, there would be no sum demandable by the county from the city. The fund was receivable by the treasurer of the county and accounted for by him to the county, and he also had imposed upon him the duty of paying the jurors and of keeping the account in respect thereof; so that the county alone had the material for determining in each year whether the fund constituted for the payment of jurors was or not sufficient for that purpose. If insufficient, the amount for which the city should be liable was to be ascertained by determining, first, what was the balance applied by the county in each year, after deducting the amounts paid to jurors at the Quarter Sessions, over and above the amount realized by the fund for the payment of jurors in each year, and that balance was to be borne and paid by the city and county respectively, in proportion to the assessed value of *all the ratable property in each, as shewn by the assessment rolls of each for the year in which the balance so ascertained had been incurred*, capitalizing the annual value in cities at ten per cent., in order to arrive at the actual value of the assessment in the city.

By the Municipal Corporation Act, which was in force at the time of the passing of 18 Vic. ch. 81, sec. 143, it was provided that every municipal corporation, at the first meeting of the corporation in each year next after the head of such municipal corporation for such year should be elected and sworn in, should appoint two auditors; and by sec. 144 it was enacted that it should be the duty of the auditors to examine, settle and allow, or report upon, all accounts which might be *chargeable upon or might concern such corporation*, or which might relate to any matter or thing under the control of, or within the jurisdiction of such corporation

for the year ending the 31st of December preceding their appointment as such auditors, and to publish a detailed statement of the receipts and expenditures and *liabilities* of such corporation in two newspapers published within the jurisdiction thereof, or in those nearest thereto, and to file their report thereon, in duplicate, in the office of the clerk of such municipal corporation, which they shall do at least one month after their appointment, and from thenceforth one of such duplicate reports shall at all seasonable hours be open to the inspection of any inhabitant of such township, county, village, town, or city, with power to take, by himself or his clerk, or his agent, but at his own expense, a copy, or copies of, or an extract, or extracts from the same at his pleasure ;” and by sec. 177 it was enacted that it should be the duty of such municipal corporations respectively to cause to be assessed and levied upon the whole ratable property in their counties, cities, towns, townships and villages, respectively, a sufficient sum of money in each year to pay all debts incurred, or which should be incurred, with the interest which should fall due or become payable within the year.

The provision in the 144th section of this act seems to have been most provident and indeed necessary, not only in the interest of the rate-payers, who were thereby enabled to see what would be the utmost amount to raise which their properties would be chargeable with, within the year, but to enable the corporation to know the amount which should be necessary for the council to raise within the year, so as to determine the rate necessary to be levied for the purpose.

The act 22 Vic. ch. 100, which was passed for the purpose of amending and consolidating the various acts relative to the mode of selecting jurors in Upper Canada, the performance of their duties and the remuneration to be by them received, adopted, in sections 146 to 149, the provisions of 14 & 15 Vic. ch. 14, for constituting a fund for the payment of jurors. Section 150 provided that in case that fund should be insufficient the several county councils should raise and

appropriate such sums of money as in their judgment are sufficient to pay the petit jurors, according to the terms of the act, thereby adopting sec. 10 of 14 & 15 Vic. ch. 14; and by sections 153 to 155 the provisions of 18 Vic. ch. 130 were adopted. This act, 22 Vic. ch. 100, came into force on the 16th August, 1858, and sec. 179 enacted that, "All former acts relating to jurors, and all acts inconsistent herewith are hereby repealed." The force of this clause, as the defendants contend, is to repeal 18 Vic. ch. 130, so as to defeat the right of the plaintiffs, if any, to recover for the years 1855-6-7. On the part of the plaintiffs, on the contrary, it is contended that 18 Vic. ch. 130 was not repealed by section 179 of 22 Vic. ch. 100, because, in the Consol. Stats. U. C. ch. 31, which is a consolidation of 22 Vic. ch. 100, the repealing clause is not contained; but inasmuch as 22 Vic. ch. 100 was at the time of the passing of the Consol. Stat. U. C. ch. 31, the only act relating to jurors then in force to govern all future proceedings, ch. 31 would naturally enough exclude section 179 of 22 Vic. ch. 100. However, it appears to be a matter of no importance to enquire whether 18 Vic. ch. 130 was or not repealed: it certainly had no future operation after the passing 22 Vic. ch. 100, and has not now, nor is it necessary that it should have any binding operation now, in so far as the plaintiffs' claim under the first and second counts is concerned; for the question to be determined is, were or not the several amounts claimed by those counts ever due from the defendants to the plaintiffs as a debt recoverable by action at law? If they were, they must have been so immediately upon the expiration of each year, in which the expense to be divided was incurred, and if they were debts then recoverable, as such, by suit at law, before the passing of 22 Vic. ch. 100, they must be so still; whereas if they were not such debts prior to the passing of 22 Vic. ch. 100, they cannot have become such since. So, in like manner, the amounts claimed in respect of the years which have elapsed since the passing of 22 Vic. ch. 100, or the Consolidated Statute 22 Vic. ch. 31, unless they became

debts due by the defendants to the plaintiffs, recoverable by suit at law immediately after the expiration of the several years in which the expenses to be divided were incurred, cannot, by reason of anything which appears upon the record, have become such since.

The effect, however, of 22 Vic. ch. 100 was not, in our opinion, to repeal 18 Vic. ch. 130, but to import its provisions into one consolidated act relating to jurors. By the Assessment Act 16 Vic. ch. 182. sec. 31, consolidated in 22 Vic. ch. 55, sec. 11, it was enacted that the council of every municipality shall every year make estimates of all sums which may be required for the lawful purposes of the county, city, &c., &c., for the year in which said sums are required to be levied, each local municipality making due allowance for the cost of collection and for the abatements and losses which may occur in the collection of the tax and for taxes on lands of non-residents which may not be collected.

The act 22 Vic. ch. 99 (Consol. Stat. 22 Vic. ch. 54), in sec. 167, provides for the annual appointment of auditors in the same terms in effect as had been provided by 12 Vic. ch. 81. Sec. 168 enacts that the auditors shall examine and report upon all *accounts affecting the corporation, or relating to any matter under its control, or within its jurisdiction*, for the year ending on the 31st day of December preceding their appointment. Section 169 enacts that the auditors shall prepare an abstract of the receipts, expenditure *and liabilities* of the corporation, and also a detailed statement of the said particulars in such form as the council directs, and report in duplicate on all the accounts audited by them, and shall file the same in the office of the clerk of the council within one month after their appointment, and thereafter any inhabitant or rate-payer may inspect the same and take copies, &c. Section 170 enacts that the council shall, upon the report of the auditors, finally audit the accounts of the treasurer, and *all accounts chargeable against the corporation*.

Section 222 enacts that the council of every township, and

the council of every county, and of every provisional corporation, and of every city, and of every town, and of every incorporated village respectively, shall assess and levy on the *whole* ratable property within its jurisdiction, a sufficient sum in each year to pay *all valid debts* of the corporation, whether of principal or interest, falling due within the year.

All the provisions of the Consolidated Statutes appear to be identical in substance with the provisions of the statutes in force in relation to the same subjects, at the time of the passing of 22 Vic. ch. 100, so that, to simplify the matters in issue, it seems to be only necessary to enquire whether, upon the facts appearing upon the record, the plaintiffs are entitled to recover in this action the amounts claimed in the first count as a debt in respect of the years antecedent to the passing of 22 Vic. ch. 100. If they are, the same principle will entitle them to recover in respect of the subsequent years, and if they are not, we do not see that they can sustain the action in respect of those subsequent years. Now, the contention of the plaintiffs is, that immediately after the close of each year, in which the expenses to be divided were incurred, the proportion to be finally borne by the city of the amount of the expenses incurred by the county, for which the fund provided by the act proved insufficient, became a debt due from the city to the county, recoverable by action without any demand being made by the county upon the city for the amount, or any communication made to the city specifying the amount for which they would be required to provide, or any communication made to the annual auditors to enable them to report as required by law upon the liabilities of the city, and that such amounts may be recovered in an action of debt brought by the county against the city at any time within twenty years, or after twenty years from the accruing of such alleged annual debts, unless the statute of limitations should be pleaded, although the bringing of such action is the only notice the city has of the existence of the alleged liability, and constitutes the only demand made upon the city for its liquidation. On the contrary,

the contention of the defendants is, that if the fund provided be insufficient, in any year, it is the duty of the county to communicate to the city the deficiency, and to ascertain the proportion to be finally borne by the city, so as to enable the council of the city in each succeeding year to that in which the expenses to be divided were incurred, to levy a rate, as required by law, for its liquidation, and that no action of debt lies against the city without such communication, the remedy of the county as prescribed by the act being, as contended, by *Mandamus*, to compel the city to levy the rate necessary for the purpose.

Upon a careful consideration of all the clauses of the several statutes cited above, we are of opinion that this action cannot be sustained. If a judgment could be obtained on this action against the corporation of the city, of Kingston, it might not only be extremely inconvenient, as affecting the corporation, but would be of necessity unjustly injurious to the rate-payers of the city. It might be that not only all the personal property of the corporation, including the office furniture and the furniture of the council chamber, money chest and moneys in hand, but that all the real property, including the corporation buildings where the business of the corporation is conducted, might be taken under a *fi. fa.*, and would be insufficient to pay the demand of the plaintiffs. The corporation have it not in their power now to levy a rate or to raise money upon debentures or otherwise to relieve their corporate property from the effect of such a seizure, and if, instead of levying upon such property, the sheriff should proceed to levy a rate under the Municipal Corporation Act, such a rate would have to be levied upon persons and property totally different from that which a rate levied, as directed by the 18th Vic. ch. 130, and the statutes passed in substitution for that act in the several years after the years in which the respective amounts of the alleged deficiencies of the jury fund to be finally borne by the city were incurred, would have affected. Such a result, in our opinion, could never have been intended by the legislature. The act 12

Vic. ch. 81, and all the acts since passed in substitution therefor, display the utmost care and circumspection in prescribing certain means of determining at an early period of each year all the liabilities of every corporation, to meet which a rate would be required in the year. The auditors and the municipal councils of the county corporation in every year had the fullest opportunity of ascertaining and determining the proportion, if any there was, of the expenses required to be borne and provided for by the city in the ensuing year. The county corporation kept all the accounts from which the deficiency of the jury fund, to meet the demand upon it, if any there was, could alone be ascertained and determined, and without some communication from the county corporation to the city, the auditors or council of the latter could have no means of ascertaining whether or not any rate, or if any to what amount, would be required to be levied upon the ratable property within the city. The ratable personal property of the inhabitants of the city must of necessity have continually changed from year to year, as likewise must the ownership of the ratable real property although in a lesser degree. After a lapse of years the rate-payers would be a totally different body from that which it was a few years previously. Purchasers, availing themselves of their right of inspecting the annual reports of the auditors of the liabilities of the ratable property in the city, have acquired property which in the absence of any such liability appearing, as that which is now asserted, they may fairly claim to hold discharged of any such liability as that now sought be imposed upon it. To charge the present owners of real property with this liability would seem to partake of the character of fraud upon them, and to affect the personal property which in each of the years was by law liable to make good the proportion to be borne by the city, if any there was, is now impossible. It seems, therefore, to be inconceivable that the Legislature could have intended that the claim of the county against the city, uncommunicated to the city, should at the expiration of each year become, and therefore from thenceforth

continue to be, of the nature of a debt recoverable by action and subject to all the incidents of such a debt, or that the county corporation, by withholding the information which they alone could supply, should have the right of abstaining from seeking redress against the rate directed by the acts to be levied, and instead thereof, after the lapse of years, to assert a claim by action, the judgment in which, in the plaintiffs' favor, might have the effect of causing the city corporation to waste all its general corporate property, or of enforcing payment from a class of persons and out of property totally different from that which the legislature by the acts imposing the obligation, made specially liable to the discharge of the obligation.

In *Scott v. The Corporation of Peterborough* (19 U.C. 471) Robinson, C. J., uses language specially appropriate to the present case. He there says: "The legislature, *in order to protect the interests of the rate-payers of the several municipalities* against abuse of the powers entrusted to the municipal councils which represent them, and which have authority for many purposes to bind them, have provided certain restrictions which would be of little or no value for the purpose intended, *if persons dealing with corporations were not obliged for their own safety* to enquire into and take notice of their powers, and what does or does not come within the proper scope of their authority." As appears by that case the corporation itself could not now levy a rate to raise the amount necessary to satisfy the plaintiffs' demand, and if a rate should be levied by the sheriff, it would of necessity have to be levied upon totally different property from that which the corporation had the power of affecting by a rate. If the plaintiffs have chosen to abstain in each successive year from making any claim and from giving to the city corporation an opportunity of levying a legal rate to meet the demand, if any there was, and moreover have thereby misled purchasers of real estate within the city to acquire and pay for such property upon the faith and belief that it was as free from all liability to a demand of the nature now asserted, as it

appeared to be by the annual record required by law to be published for the express purpose of defining the extent of the liabilities of the corporation in each year, it does appear not unreasonable to hold that the county corporation has by its conduct, extending over a long course of years, precluded itself from now asserting that any such claims existed in those years.

The object of 18 Vic. ch. 130, and the other substitutionary acts, was to declare that a yearly rate should be levied in each succeeding year to raise the amount, if any, necessary to pay the proportion finally to be borne by the city for the preceding year, with authority to the city corporation to pay such proportion out of any moneys, if any there were in their hands applicable to municipal purposes generally. If there were no such moneys none such could be paid. The remedy of the county corporation is given against the rate required to be levied. The liability then which is imposed by the statute upon the city is not imposed upon the corporation in the nature of a personal obligation to pay absolutely out of the general corporate property, but an obligation to levy a rate to pay unless they should have moneys in their hands applicable to municipal purposes generally. The rate required to be levied is a specific fund upon which the liability is imposed, and an action of debt, therefore, does not lie against the corporation upon the facts disclosed on this record: *Addison v. The Mayor of Preston* (12 C. B. 134); *Jones v. The Mayor of Carmarthen* (8 M. & W. 615). The Acts of Parliament upon which *Tilson v. The Warwick Gas-light Company* (4 B. & C. 962), and *Carden v. The General Cemetery Company* (5 Bing. N. C. 258) proceeded, charged the claims sought to be recovered upon the first moneys which should be received by the respective corporations under their acts, and the declaration averred the receipt by them of such moneys. If, in the present case, the plaintiff had, in each year, made a demand upon the defendants for their proportion, and the defendants had levied rates in each year to meet those demands, and had received the moneys arising

from the rate, then the action of debt might perhaps be sustainable, upon the authority of those latter cases, as for moneys received to the use of the plaintiffs; but that would be a totally different case from that which is disclosed on this record.

Lord Holt's judgment, in the case in 3 Mod, 27, proceeds upon the fact that the statute in question in that case had imposed a liability generally to pay, and had provided no fund to meet the payment. *In Hopkins v. The Mayor of Swansea* (4 M. & W. 621, and in Error, 8 M. & W. 901), proceeding upon the same principle, it was held that a corporation was liable to an action of debt, because by the act there referred to certain lands, wherein the plaintiff had a pecuniary interest enforceable by action, was transferred to the corporation, with a proviso annexed that every person should enjoy the same share and benefit as fully and effectually as he had at the time of the passing of the act; and it was alleged that the corporation had in hand funds arising from the lands which they did not shew by plea to have been exhausted by any liens thereon prior to the interest of the plaintiffs therein.

Brady v. Bellew (6 Ir. L. Rep. 348) proceeded upon the same principle laid down by Lord Holt. There an Act of Parliament having empowered parties to present certain sums for certain specific secular purposes to be raised off the inhabitants, and to appoint proper persons to *applot and levy* the sums so presented, and to allow such persons poundage on the sums so *applotted* and levied: it was held that the persons so appointed to *applot* and levy, having applotted the amounts, could maintain an action of debt to recover the amounts applotted. The effect of the decision is, that the applotments being made, their respective amounts were constituted to be debts from the persons upon whom the applotments had been made for the specific sums applotted, payable to the persons appointed to *applot and levy*, as the act provided no specific remedy. In that case it is to be observed that the applotment of a specific sum, in pursuance of the authority conferred by the act,

formed a material element in the decision. Here there is not only nothing equivalent to an applotment of any specific sums, but a specific remedy is provided in the rate required to be levied in each year, which cannot, as it appears to us, be levied without a prior demand or communication of some kind made by the county corporation upon or to the city, so as to enable the latter to levy a sufficient legal rate to meet the claim. In *The County of Middlesex v. The City of London* (22 U. C. 196) none of the points raised upon this record arose. There the county, in 1862, claimed, in an action of debt, from the city, their proportion of expenses incurred for the payment of jurors, in the years 1855 to 1861 inclusive, but the only point which was raised, and which came before the court on a special case, was as to the mode in which the amount was to be computed. That case therefore affords no precedent for this, and in our judgment the case, as presented on this record, is unsupported by precedent, and cannot be supported without ignoring the provisions of the various statutes which affect the case. In view of the various other provisions of the statutes, the legislature never could have intended by the words, "and the portion of such expenses to be finally borne by the city, shall be payable to the county immediately after the close of each year," that although the city corporation should have no "moneys in their hands applicable to municipal purposes generally," they should still be liable in an action of debt to an execution which would render liable all their corporate property before any opportunity should be given to them to levy the rate directed by the statute to be levied to meet the demand, or that the county corporation, which possessed alone the knowledge whether there was in any year a deficiency required to be provided, should withhold all claim for any portion of such deficiency while it was in the power of the city to levy a legal rate, and abandoning all claim against the remedy provided by the statute, at any distance of time, assert a claim by action of debt against the city, the consequence of which might be destruc-

tive of all the general corporate property of the city; and most unjust to the rate-payers at the time judgment in such action should be recovered. The words "shall be *entitled to demand* and recover from the municipal corporation of any city, which shall form part of such county for judicial purposes," will, I think, receive the construction which is most consonant with the other provisions of the several acts, and with a due regard to the the rights of persons who have become inhabitants and rate-payers of the city in years subsequent to the several years in which the respective expenses are alleged to have been incurred, if we hold that they extend only to giving the county corporation at the expiration of each year, that is, in each successive year, a right to *demand* of the city their proportion of the expense incurred in the preceding year, so as to enable the city to levy the rate as required by law, and to enable the county, in the manner contemplated by the legislature, to *recover* the amount, the right being conferred upon the county of enforcing their right of recovery by Mandamus, if the city should neglect or refuse to levy the necessary rate. Such a construction will afford every reasonable facility to enable the county to *demand* and *recover* from the city its proportion of the expenses incurred, and will obviate the necessity of yielding to the contention of the plaintiffs in this action, which involves such manifest injustice to the corporation of the city and the present rate-payers therein. In our opinion, therefore, judgment should be in favor of the defendants upon all the demurrers.

As to the fourth plea, which is to the first and second counts, that plea appears to me to be a good answer to the causes of action set forth in those counts, even assuming that the united counties had good cause of action at the expiration of each year, for, upon the separation of the counties, all assets, and therefore these claims, if assets, were either divided or not divided among the respective counties. If not divided, they would be recoverable only in the name of the original corporation to whom the debt,

if a debt, first accrued. If divided, and, as alleged in the declaration, by agreement, upon the separation, assigned to the plaintiffs, that assignment constitutes the plaintiffs' right to sue in their own name, and the averment is therefore material, and the averment being denied by the plea, which is admitted by the demurrer to it, judgment should be for defendants on the demurrer. That the averment is material appears clear from this, that it was the duty of the separating corporations to divide the assets between them. If not, as alleged in the declaration, assigned to the plaintiffs they would have been, if the law had been complied with, assigned to the junior county separating, and if so assigned the plaintiffs could not recover assets belonging to the separating county. The object of the statute authorizing the assignment is to transfer the property and *cause of action* to the assignee, overriding the general principle of the common law that a chose in action is not transferable. The title to sue rests on the averment of assignment in the counts. In the view which I have taken, I have not deemed it necessary to dwell upon this point, or to refer to the various other points urged in the argument.

HAGARTY, C. J.—I think the claim of the plaintiffs is satisfactorily answered by the 7th plea, that the several sums were not determined and demanded by plaintiffs as the same became determinable and demandable by law, and that defendants had no notice of said sums being claimed until this present year; wherefore defendants did not during the several years raise by assessment or otherwise provide the sums requisite in each year for payment thereof, and defendants had not then, nor at the time of action brought, any moneys to pay the same, or set apart as applicable thereto, and no estimate or provision had been made for such payment, and defendants had no means to pay without levying a retrospective rate.

The intention of the Legislature seems to have been clear; in its own words, "the portion of such expenses

to be finally borne by the city shall be payable to the county immediately after the close of each year."

At the end of each year I think it was incumbent on the county to ascertain and determine, from records and materials under their own control, the amount, if any, payable by the city, and to communicate the same to the city, and thereupon, and not till then, I think the city should either pay the amount out of any moneys on hand applicable thereto or levy a rate therefor. The sum required would be part of the legitimate requirements of the city for the then current year, and should be borne as part of that year's proper burden. If never ascertained or demanded in that year, I incline to think that it cannot be recovered.

The county should certainly provide in each year for the jurors' expenses of that year.

Section 4 empowers the city council to raise by assessment "any sum of money required by such city for the purposes of this act." What money is here meant? The possible accumulated arrears of a dozen years, during which the county has omitted to ascertain or demand any sum from the city? Or is it not rather the sum which, in the words of sec. 3, "shall be payable to the county immediately after the close of each year?" And the same section speaks of the assessable amount being that shewn on the rolls of each municipality "for the year in which the expenses to be divided between them were incurred."

All this points, in my judgment, to an annual ascertaining and demanding of the city's proportion of an annual charge. Any other construction shifts the burden of the legitimate annual charges required by the legislature to another set of rate-payers, and to large quantities of property brought into the city, possibly years after the particular year has elapsed which ought properly to have borne the charge. As is said by the court in *Woods v. Reed* (2 M. & W. 784), "The general inconveniences of retrospective rates has been long known and recognized in courts of law, on the ground that succeeding inhabitants

cannot legitimately be forced to pay for services of which their predecessors have had the whole benefit." The cases are cited there, from *Taney's* case in Salkeld, downwards. The matter seems to stand thus: The county could each year have ascertained and demanded the proportion of jurors' expenses. Had they done so the city could have promptly levied the required amount from the then ratepayers. This is not done for thirteen or fourteen years, and then a very heavy demand is for the first time made on the city, and the now ratepayers are asked to bear the whole burdens of thirteen past years, from which, by the plaintiffs' neglect, their predecessors have wholly escaped.

I cannot bring myself to believe that such a claim can now be legally enforced.

No doubt there are claims which arise against corporations for wrongs done or services rendered in preceding years, and they can be enforced if brought within the statutable limit of time. But here, the obligation is purely a creation of the statute, and I gather from its language, and the import of all the municipal provisions for the levying and payment of claims so created, that they should be ascertained yearly and claimed yearly. The whole machinery of municipal finance seems to be framed on such a supposition.

In the view I take of the case, it is unnecessary to discuss the other objections. There seems much force in Mr. Agnew's argument as to the division and appropriation of assets and liabilities on the separation of the counties.

GALT, J., took no part in the judgment, as the case had been argued before his appointment to the Bench.

Judgment for defendants on demurrer.

McDONALD V. BONFIELD AND TURNER.

Timber license—Removal by licensee of hay cut on limits by wrong doer—Trover.

The entry of a party on timber limits to cut hay, and his cutting and stacking it on the land, do not give him such property in the hay cut as to enable him to maintain trover for its removal against persons claiming by virtue of Crown licenses then in force.

Trover for the conversion of ten tons of hay.

Pleas, not guilty, and goods not plaintiff's.

Issue.

The piece of land upon which the hay, which was the subject of the cause of action, grew, was a beaver meadow situate on lots 8, 9, and 10, in the 3rd concession of the township of Hagarty, in the unorganized territory known as the Nipissing District, and the hay growing thereon was natural or wild hay.

A verdict was rendered against defendant Turner alone for \$100, leave being reserved to him to move against it and to enter it for him, if the court should be of opinion that plaintiff was not entitled to recover for the taking of the hay.

John Patterson, in Easter Term last, obtained a rule upon the leave reserved.

This term *Read*, Q.C., shewed cause, citing *Farquharson v. Knight*, 25 U. C. 413 ; C. S. U. C. ch. 23, sec. 2.

Deacon, contra, cited *Harper v. Charlesworth*, 4 B. & C. 574 ; *Wells v. Cunningham*, 4 B. & C. 470 ; *Henderson v. McLean*, 8 C. P. 42 ; *Alexander v. Bird*, 8 C. P. 539.

[The Chief Justice referred to *McMullen v. McDonell*, 27 U. C. 36.]

GWYNNE, J. delivered the judgment of the court.

Upon the evidence, as appearing at the trial, we must regard the plaintiff as a person not having any right to possession of the land in question in virtue of any contract with the Crown, and no actual occupation or possession was

proved other than such as consists in his having, in the month of July, 1868, entered upon the meadow and cut the wild grass growing thereon, stacked it on the meadow and placed a few rails round the stack. In so far as the Crown is concerned, the act of the plaintiff must be regarded as wrongful, and consequently the plaintiff acquired no property in the hay as against the Crown.

It appears then that on the 27th November, 1867, a timber license was duly issued to one Foran for certain limits, comprising the beaver meadow in question. This license continued until the 30th April, 1868. By the regulations of the Crown Land Department relative to timber licenses, which were proved in evidence, it is provided, "License holders, desirous of obtaining renewal of license, must make application for such renewal to the Crown timber agent of the locality before the 1st July in each year, stating what berths have been occupied, failing which such berths shall be charged with the rate of ground rent payable on non-occupation." These regulations also provide that "License holders, who shall have duly complied with all existing regulations, shall be entitled to renewals of their licenses, provided they shall have made and delivered to the Crown timber agent of the locality, before the 1st day of September, or such prior date, in any locality, as the Commissioner may fix, sworn statements of the number and description of pieces of timber and saw-logs cut by themselves, or by others, to their knowledge, upon each of the berths held by them during the previous season, and shall have paid to the Crown on or before the 5th day of December following, the ground-rent payable for renewal of their licenses for the ensuing season." We may assume that the licensee, Foran, complied with these regulations, for by the evidence it appears that a renewal licence for the same limits was on the 24th day of October, 1868, issued to him, to continue in force until the 30th April, 1869, subject to the like regulations as to further renewal. For this renewal license he paid a ground rent of \$25. Now, the act 22 Vic. ch. 23, sec. 2, enacts that these

timber licenses "shall confer for the time being on the nominee, *i. e.*, the licensee, the right to take and keep *exclusive possession* of the lands described in the license, subject to such regulations and restrictions as may be established. The regulations and restrictions here referred to are those contained in the license relating to persons "settling under lawful authority or title within the location hereby licensed," as to whom it is provided "that they shall not in any way be interrupted in clearing and cultivation by the said licentiate or any one acting for him or by his permission." Now, as upon the evidence we must regard the plaintiff as having no title, property or possession as against the Crown, we must construe the license of the 24th October, 1868, as conferring on Foran exclusive possession of the meadow upon which the hay had grown, and the exclusive right to the hay then cut and stacked thereon. Now, the act which is complained of as the act of conversion, is the entry of Turner, under the authority of Foran, in virtue of this license, in the month of October, 1868, and taking the hay there found in stack upon the meadow. This act was authorized by the license from the Crown, and therefore the defendant cannot, by such act, be made a wrongdoer at the suit of a person having no title as against the Crown. The case does not seem to be governed by *McMullen v. McDonell* (27 U. C. 36); *Henderson v. McLean* (8 C. P. 42, 16 U. C. 620); *Wells v. Cumming* (27 U. C. 470), or any of the cases cited: the only point arising in the case, and which therefore is the only point to decide, is, that the entry of the plaintiff on the beaver meadow in July, 1868, to cut the hay, and his cutting and stacking it on the meadow, did not give to the plaintiff such property in the hay so cut as enables him to maintain trover against persons claiming in virtue of the Crown licenses proved in this cause.

The rule will be made absolute for entering a verdict for the defendant Turner, or, if the plaintiff, within three weeks, prefer it, a nonsuit.

BONTER V. NORTHCOTE.

Dower—Wife not named in commencement of deed—Release in body of deed, and execution by her.

Husband by deed aliens land, and the wife, though not named in the commencement, as a formal party, in the body of it releases her dower, and both execute it:

Held, a sufficient bar of dower by her within 2 Vic. ch. 6 (C. S. U. C. ch. 84).

DOWER.

Plea, that demandant, by deed, jointly with her husband, duly barred her dower.

The case was tried at Belleville, before Morrison J.

A deed was put in evidence, dated 13th November, 1841, between Jacob Bonter, of the one part, and C. H. Herchmer, of the other part, whereby Bonter sold in the usual manner to Herchmer, in fee, with full covenants for title, &c. Then the last clause of the deed was, "and also that the said Sarah Bonter (the first mention of her name), wife of the above named Jacob Bonter, in consideration of 5s. to her paid, &c., hath remised, released, &c., and doth release, &c., to said C. H. Herchmer, his heirs, &c., all and all manner of dower, right or title of dower, which she, the said Sarah Bonter, in the event of surviving the said J. B., her husband, might or of right ought to have," &c., &c., in the usual form. Then, "In witness whereof the said parties have hereunto set their hands and seals, &c.

(Signed) JACOB BONTER. [Seal.]

(Signed) SARAH BONTER. [Seal.]

(Signed) CHAS. L. HERCHMER." [Seal.]

It was objected that, as Mrs. Bonter was not a formal party to this deed, her dower was not duly barred.

On the jury finding the due execution of this deed the learned judge directed a verdict for the tenant, reserving leave to demandant to move to enter verdict for her, if the court thought her so entitled.

Dickson obtained a rule accordingly, to which *Wallbridge*, Q. C., shewed cause.

The authorities referred to were, *Doe Bradd v. Hopkins*, 2 O. S. 213; *Foster v. Beale*, 15 Gr. 244; 2 Inst. 673.

HAGARTY, C. J.—The objection in this case is purely technical. A properly worded release of dower was in fact executed by the demandant, and it is contained in the body of a deed, to which her husband is a party, granting the estate. She signs and seals the deed as her act; but she is not named in the commencement as a formal party. I think it would be contrary to all the rules governing the interpretation of deeds if we were to hold that this instrument is inoperative against her.

The deed before us is an indenture *inter partes*, a mere formal alteration in its heading, making it a deed-poll, whereby Bonter, the husband, in consideration, &c., bargained and sold to the grantee; and if in the body there were a clause like that before us, releasing the wife's dower, and he and she executed the deed, there could be no doubt but it would be sufficient,

Hill and Wife v. Greenwood (23 U. C. 405) is express on this point.

There the husband had parted with the land by a previous deed, in which his wife had not joined. Afterwards a deed-poll was executed by the wife in the form, "Know all men, &c., that E. M., wife of S. M., in consideration, &c., by and with the consent of her husband, the said S. M., signified by her signing and sealing these presents, hath remised, released, &c. In witness, &c., we have set our hands and seals;" and she and her husband executed it.

It was objected that it was only in a deed executed by her, where her husband was conveying the land, that the statute dispensed with the formal acknowledgment.

Draper, C. J., reviews the statute law, and says, "It cannot be denied that this case is within the letter of the 2nd Victoria, although the husband is joined in it only to testify his assent to the wife's releasing her dower. * * I should be content to rest a decision in favour of the tenant on this ground."

The 3rd section of this act says, "Whenever any married woman shall join with her husband *in any deed or conveyance whatever, wherein a release of dower is contained,* * * * such execution shall be deemed a valid and effectual bar of dower, &c., any law, usage or custom to the contrary thereof in anywise notwithstanding."

Speaking of this clause, Draper, C. J., adds, "the *non-obstante* conclusion gives additional reason for a liberal application of the newly-given authority to bar dower."

As the case stands before us, we have an instrument by which the husband aliens the estate, the wife in the body of it releases her dower, and they both execute it. This must be within both the letter and the spirit of the statute.

To hold otherwise must be to assert that unless the wife is described in formal terms as a party in a deed, to which her husband is a formal party, no words, however extensive, inserted on her part and verified by her hand and seal, can operate.

Where the husband conveys by deed-poll, he appears to be the only formal party, except the grantee; yet there can be no doubt that a clause of release of dower, with apt words at the end, and the hand and seal of the wife, would bar her interest.

The point is reduced to the merest technicality.

I am not prepared to yield to the objection.

A case of *Bradt v. Hopkins* (2 O. S. 213) is cited, where our court held a deed made by a married woman, to which her husband was not a party, but executed the same, insufficient to release her dower. This case was quoted in *Foster v. Beale* (15 Grant, 244). A passage in 2 Inst. 673 is relied on; but in *Salter v. Kidley* (1 Shower 56) Holt, C. J., takes a liberal view of the law. Covenant in a deed between A. & E: by the deed B. also did covenant. The Chief Justice said, "Why cannot a man oblige himself by a deed, if there be no express words for it and he seals it? Suppose at the end of an indenture it be, 'And be it known unto all men that A. B. for himself covenants,' &c., and he seal it, why should not this oblige him? A man cannot

take immediately where he is not a party, but where do you find that a man cannot give without being a party?"

The cases are reviewed in 2 Prest. Convey. 394 *et seq.*

The modern case, *Dent v. Clayton* (10 Jur. N. S. 672) is noteworthy. Husband and wife were parties to the deed, and it was recited that they had agreed to join, and in the granting part it said that the husband did by that deed, "intended to be acknowledged by the said Sarah, &c., as her act and deed," convey, &c. The wife was thus not actually joining in the grant. Page Wood, V. C., says, "Here the husband is put by mistake for the wife, or the wife omitted. * * If you do not import the wife's name as joining in the conveyance, you have her executing a most solemn deed, and yet doing nothing. I think the authorities warrant me in saying she has conveyed the estate free from encumbrances."

I think this dower is sufficiently released: the whole course of our legislation on the subject, and the view taken in *Hill v. Greenwood* fully justify this conclusion.

GWYNNE, J.—It appears to me to be very plain that a married woman, during her husband's life, effectually bars her dower in land, of which he is seised, by joining with him *in executing* a deed or conveyance thereof, in which a release of dower is contained, whether she is or not named in the premises of the deed as a party thereto.

By 37 Geo. III., ch. 7, sec. 1, it was enacted that it should and might "be lawful for any person entitled to dower, by *any deed executed* either alone or jointly with other persons, to release all her right and title to dower in the lands, tenements and hereditaments therein mentioned and described, as effectually as if a fine had been levied thereof, any law or usage to the contrary notwithstanding."

But by the second clause, before such deed should have the effect of barring the dower, it should be acknowledged in a particular manner provided by the statute.

The statute 3 Wm. IV. ch. 9, which was passed for the purpose of affording greater facility in barring the right

of dower, provided a more ready means for taking the acknowledgment.

Then 2 Vic. ch. 6, sec. 3, which was passed for the purpose of providing still greater facilities for barring dower, did away with the necessity of the acknowledgment altogether, and enacted that, "whenever any married woman *shall join* with her husband in *any* deed or conveyance *whatever*, wherein a release of dower is contained, it shall not be necessary to acknowledge the same before any court, judge, or justice of the peace, *but such execution* shall be deemed a valid and effectual bar of dower of and in the premises mentioned and described in such deed or conveyance, any law, usage or custom to the contrary thereof in anywise notwithstanding."

Now, from the language of this section, it is apparent that the *joining with her husband* contemplated is *joining in the execution*, and not being joined with him or being named in the premises of the deed as a party to the deed; for, 1stly, it is "shall join in *any* deed," whether a deed poll, which has no parties named in the premises, or an indenture, which has; provided only the deed contains a release of dower in the lands mentioned and described in the deed; and, 2ndly, the words are, "but *such execution* shall be deemed a valid and effectual bar of dower, &c." Now, the term "*execution*" has not been before used in the section. To what, then, can the words "*such execution*" apply, unless that term is implied in the words "shall join with her husband in *any* deed, &c.;" that is, "shall join with her husband *in the execution* of any deed," &c.? Then, "*such execution* shall be deemed," &c.

Then it is this section which, in briefer language, but the same sense, is consolidated in 22 Vic. ch. 84, sec. 4; thus, "a married woman may bar her dower in any lands or hereditaments in Upper Canada by *joining with* her husband in a deed or conveyance thereof, in which a release of dower is contained." There, in like manner, the "*joining with her husband*" meant, is, plainly, the *joining in the execution* of the deed containing the release of dower.

Now, in the deed before us, the husband grants, bargains and sells, &c., the land described in the deed. The wife has no estate in the lands which she can grant, bargain, and sell. She cannot sensibly, therefore, be said to *join with* her husband in *his* grant. So, in like manner, the deed contains a release of dower in the same land, and the deed is express that the wife releases her dower in those lands. Here, again, the husband has no dower, and consequently *he* cannot sensibly be said to *join with* the wife in releasing that which she has, but he has not; but they both *join in executing* the deed, which must in all reason be held to operate according to its expressed intention upon that estate which each has, and which the deed correctly defines. But, it is said, the wife is not expressed to be a *party* to the deed in the premises; but to make the release of dower effectual the statute does not say that she shall be. I cannot see what we have to do, in a case of this description, with the antique learning as to what an *indenture* is; whether it must or not be expressed in the premises to be made *inter partes*, or whether it must or not have the edges of the parchment or paper notched *instar dentium*: for all useful and necessary purposes it is sufficient for us to see that *this* is a *deed executed under the hand and seal of the husband*, the grantor of certain lands therein mentioned and described, *in which*, for the purpose of barring her dower in the same lands, *the wife joins with her husband* by executing under her hand and seal a release of dower in those same lands therein contained. All the requirements of the statute have been complied with, and effect must be given to the deed according to its expressed intent. I confess I have been wholly unable to understand how a doubt could exist upon the point.

GALT, J., concurred.

Rule discharged.

IN RE SHARPE, AN INSOLVENT.

Insolvency—Appeal—Practice—Executors of debtor—29 Vic., ch. 18, sec. 3.

On an application to him for the allowance of an appeal from the decision of the judge in insolvency, the judge in chambers made an order referring the matter to this court without directing a special case to be settled between the parties, but no objection was made on this ground : *Held*, that this was only an irregularity which might be waived, and if not waived ought to have been objected to by a rule to set aside the proceedings on that ground, in accordance with *In re Parr*, 17 C. P. 626 ; and that as the petition of appeal had been filed by permission of the court, and the appellant authorized to serve notice of hearing of appeal for a day named, the case was properly before the court for adjudication. Sec. 27 of the Insolvent Act of 1865 (29 Vic. ch. 18) does not enable the creditors of a deceased person to put his executors or administrators into insolvency in their representative character.

APPEAL from an order in insolvency, made by the county judge of the county of Oxford, dated 12th June 1869.

The facts were these : The appellants were executrix and executor of one Sharpe, and on the 1st June, 1869, under an order of the said judge, the respondents issued a writ of attachment, in compulsory liquidation, in insolvency, against the appellants, as executrix and executor of said Sharpe. Under that writ all the latter's estate in the hands of the appellants, in their representative character, was seized and attached by the sheriff of the county of Oxford.

The attachment was issued upon affidavits made by McInnes, one of the respondents, who were creditors of the deceased's estate, and two other clerks of the respondents, stating that, to the best of their knowledge and belief, defendants (above appellants) as such executrix and executor, were insolvent within the meaning of the Insolvent Act of 1864 and amendments thereto, and had rendered the estate of Sharpe liable to compulsory liquidation, and their reasons for so believing were, that Sharpe was a trader, and that his executrix and executor had permitted an execution to be issued against them, *as such* executrix and executor, under which the goods and chattels of said Sharpe were seized, and had allowed said execution to

remain unsatisfied until within forty-eight hours of the time fixed by the sheriff for the sale thereof under such execution.

The appellants, as such executrix or executor, presented their petition to the judge of the said county court, insisting that the estate and effects of their testator, come to their hands as such executrix and executor to be administered, had not become subject to compulsory liquidation, and praying that the writ of attachment and all proceedings taken thereunder should be annulled.

The judge of the county court, upon hearing the parties, by his order, bearing date the 12th June, 1869, discharged the petition with costs, thereby affirming the writ of attachment and the proceedings thereunder.

The appellants, within the time in that behalf appointed by the Insolvent Act, and in compliance with the provisions of that act, applied in due form to Galt, J., sitting in chambers, for an allowance of an appeal from said order, and by an order made in chambers by him, dated the 9th day of July last, the appeal was allowed and the matter referred to the Court of Common Pleas, to be heard the following term.

Accordingly, by leave of the court, notice was directed to be given, upon the application of said appellants, for the hearing of the matter of said petition of appeal, upon Friday the 26th day of November last.

Upon that day *Crombie*, on behalf of respondents, and by way of preliminary objection, urged that the petition was not presented in due time, and could not therefore be heard, referring to sec. 7, sub-secs. 3 and 4 of the Insolvent Act of 1864, and secs. 84, 85, and 154 of the act of 1869, contending that if the procedure was to be governed by the former Act the petition of appeal should have been presented to the court within the first four days of term; and if by the latter act, the appeal should have been made within five days from the date of the order appealed from; and upon the merits, that the issuing of the writ of attach-

ment was regular and authorized by the 27th sec. of the Insolvent Act of 1865.

Moss, contra, contended, firstly, in answer to the preliminary objection, that the appeal was in due time, whichever act governed the procedure, and that the day for hearing the appeal was duly appointed by the Court, and the matter was therefore properly before the Court for adjudication; and upon the merits he contended that the 27th section of the Insolvent Act of 1865 referred to did not authorize the putting the executors of a deceased trader, who were not trading with their testator's effects, which these appellants were not, into compulsory liquidation, as insolvents, in their character of executrix or executor, and that the 134th section of the Insolvent Act of 1869, where the 15th sub-sec. of sec. 11 of the Insolvent of 1864, and the 27th sec. of the Insolvent Act of 1865, were placed together in consolidation, shewed that no such thing was intended.

GWYNNE, J.—We are of opinion that the preliminary objection is untenable, whether procedure is governed by the Act of 1864 or that of 1869; but as we are of opinion that it is the latter Act which regulates procedure, it is only necessary to refer to it.

The 84th section of that act provides that no appeal from the decision of the judge in insolvency shall be permitted unless within five days from the rendering of the order or judgment intended to be appealed from, the party desiring to appeal causes to be served upon the opposite party and upon the assignee an application in appeal, setting forth the proceeding before the judge and his decision thereon, and praying for its revision, with a notice of the day on which such application is to be presented, and also, within the said period of five days, causes security to be given before the judge, by two sufficient sureties, that he will duly prosecute such appeal, and pay all costs incurred by reason thereof by the respondent. It was not objected that this section had not been complied with; on the contrary, it was ad-

mitted, in argument, it had been, and that the required notice was given that the application would be presented before Galt, J., in Chambers, and that it was accordingly so presented. By the 83rd section it is provided that the appeal may be to either of the Superior Courts of Common Law, or to the Court of Chancery, or to any one of the judges of the said courts, but that any appeal to a single judge may, in his discretion, be referred, on a special case to be settled, to the full court, and on such terms in the meantime as he may think proper and just. In this case the appeal was to a single judge, and the matter came before him in chambers on the 9th day of July, 1869. No objection was taken as to the regularity of the proceedings up to this point. Upon that day Galt, J., before whom the matter was, in the exercise of his discretion, made an order referring the matter of the appeal to the full court. No doubt the regular mode of proceeding then was that a special case should be settled, but no objection for any want of such a special case was made, and the want of it, we think, could constitute only an irregularity which might be waived. Moreover, in *In re Parr* (17 C. P. 626) it was intimated by this court that the proper way to object for irregularities is to move a rule to set aside the proceedings, and not to raise the point when the case comes up for argument. The fallacy of the respondent's contention appears to be in regarding the appeal in this case to be to the court direct, instead of to a single judge, who in his discretion referred the matter to the court. During last term the petition in appeal was filed by leave of the court, and the appellant was authorized to serve a notice for hearing of the matter upon the 26th November. Under these circumstances we think the merits are sufficiently before us for adjudication, and upon those merits we are all of opinion that the appeal must be allowed, and that the writ of attachment must be annulled. We do not think that the language which the legislature have used authorizes a construction apparently so injurious and unjust as that the difficulties naturally incident

to the collection of the assets of a deceased person by his executors, causing inevitable delay in the payment of the debts of the deceased, should be attended with such consequences that the approaching enforcement by one creditor of an execution upon the assets of the testator should enable another creditor to put the executors, though only in their trust capacity, into insolvency, or that *primary* proceedings in insolvency can at all be taken against them in their representative character. In our opinion the provisions of the act, which have been relied upon in support of this writ of attachment, all relate to the case of the death of an insolvent pending proceedings in insolvency. In such a case the act of 1864 seemed to provide only for the representative of the deceased insolvent becoming an *actor* in the proceedings, for the purpose of continuing them, for the purpose of procuring a discharge of the insolvent's estate, or a confirmation thereof, or both, the legislature seeming to think that, as the personal representative might not choose to become the actor in some cases, it was but just that the proceedings should not abate, but that the assignee might pursue the proceedings in insolvency, as an actor, against them, and so in the act of 1865 it was provided that the representatives, real and personal of a deceased person, that is, a deceased insolvent, should be *liable* to the provisions of the act, as the deceased person would himself have been, if living, but not to the extent of imposing any personal *liability* upon them to any greater extent than they would have been liable to creditors. This in some cases would be a very necessary provision, as in the case of the death of an insolvent shortly after the issuing of the writ of attachment in compulsory liquidation, before an inventory of his estate and of his debts and credits was obtained, or before his assets were collected and got in by the assignee, it was important to provide that the administration of the estate should continue in the hands of the assignee, and not pass to the representatives of the deceased, and that these repre-

sentatives should be liable to account for all assets that might come to their hands, and to produce all the necessary books, and to render all the necessary accounts, and to give all the information in their possession, upon examination of the representatives, if necessary, and, in fact, to do all things *within their power* to enable the assignee to proceed with the administration of the estate to the same extent as the insolvent himself would have been liable if he had not died, and to render them liable to the assignee if they should commit any waste of any assets come to their hands. But we cannot hold that the legislature contemplated giving to the creditor of a person who, as in the case before us, may have departed this life in a most undoubted and perfect state of solvency, the power of putting his executors, although only in their representative capacity, into insolvency, because of the delays which may arise in their discharging their testator's debts, or even for any negligence of theirs in collecting these debts. The law has provided ample remedies against executors to compel them to discharge their trust without subjecting them to the liability of being made insolvents in respect of their acts or defaults, as executors, to which if they should be subjected, it would be difficult, if not impossible, to find any persons willing to incur a responsibility so onerous and so calculated to ruin their own credit and standing in their own private transactions. With such a responsibility facing the person who should venture to interfere with the assets of a deceased person, it would not be matter of much wonder if the assets should be left uncollected and uncalled in, and so perhaps eventually that they should become wholly lost.

HAGARTY, C. J.—The attempt to place these executors in insolvency, on something done by them, was under the words in sec. 3 of the act of 1865: "Or if, being a trader, he permits any execution issued against him, under which any of his chattels, land, or property, shall be seized in execu-

tion, &c., &c., to remain unsatisfied till within forty-eight hours of the time fixed by the sheriff or officer for the sale thereof."

This, if applicable to executors or administrators, would make the fact of their being traders an essential.

I fully agree with my brother Gwynne in the result of his judgment.

Nothing but words of overwhelming cogency could induce me to believe that the legislature intended that persons, assuming the duties of executors or administrators, an office thankless at all times, and generally assumed from motives of kindness, should be personally liable to being advertised over the province as insolvent debtors, because out of the assets in hand they might not possibly be able to discharge an execution against goods or lands!

It is easy to talk of the difference between insolvency, as an executor, and insolvency personally: the damage to credit and standing would probably be equally fatal. No man in business would dare to undertake such an office, and serious questions might arise as to personal disabilities and disfranchisements consequent on insolvency.

I think we are safe in holding that the words of the statute, as they now stand, are not capable of such a startling application as the creditors have striven to give it.

Appeal allowed.

STEWART V. MOFFATT.

Slander—Certificate for full costs—31 Vic. ch. 24 (Ont.)

In an action for slander plaintiff is entitled, under a certificate for full costs, pursuant to 31 Vic. ch. 24 (Ont.), to tax full costs of suit; but, per Gwynne, J., he is not so entitled, without a certificate, upon the ground that some of the words mentioned in the declaration are not actionable without specific damage laid.

DECLARATION in slander, words charged being, "You are a thief, robber, liar, and drunkard," premising that plaintiff was a farmer and cattle dealer, whereby he was injured in his business and people ceased to deal with him, and one R. W., who used to endorse for him, refused any longer to do so, and other people shunned him, &c.

Second count to the same effect.

Pleas, not guilty and justifying the word "thief."

The case was tried before Morrison, J., a verdict rendered for plaintiff, and the judge certified in the words, "I certify to entitle the plaintiff to full costs."

Harrison, Q. C., obtained a rule to rescind the certificate, on the ground that no special damages being claimed or proved and verdict 1s., the judge had no power to certify against the statute 21 James I.

J. Read shewed cause, citing *Moore v. Meagher*, 1 Taunt. 39; *Evans v. Rees*, 9 C. B. N. S. 391.

Harrison, contra, cited *Cross v. Waterhouse*, 23 U. C. 590; *Sampson v. McKay*, L. R. 4 Q. B. 643; *Cameron v. Campbell*, 11 U. C. 159.

HAGARTY, C. J.—In *Pedder v. Moore*, 1 P. Rep. 117, in Slander and 1s. damages, the judge certified that the grievances were wilful and malicious. The law then in force here was 16 Vic. ch. 175, sec. 26, which is to the same effect and copied from Imperial Act, 3 & 4 Vic. ch. 24, sec. 2, that if plaintiff in any action of trespass or trespass on the case recover less than 40s., he shall not be entitled to any costs whatever, &c., unless the judge certify

that the action was really brought to try a right, &c., or that the trespass or grievance was wilful or malicious.

Our Court of Queen's Bench held that without the certificate the plaintiff, under the last clause cited, could get no costs whatever ; but that with the certificate he gets the same amount of costs as damages under 21 James I.

This was about 1855. In 1860 the case of *Evans v. Rees*, (9 C. B. N. S. 391), expressed the opinion of the Court to the same effect on 3 & 4 Vic. ch. 24. Erle, C. J., held that the effect of the judge certifying that the grievance was malicious, &c., took the case out of the enacting part of sec. 2 (the same as our act), and left him in the same position as if the act had not been passed, that is, before the 21 Jas. I. ch. 16, entitled to full costs, and after the passing of that statute, to as much costs as damages.

Byles and *Keating*, JJ., agree, the latter saying that the argument would have been strong "to shew that the statute of James was virtually repealed, if the 3 & 4 Vic. had contained an express enactment that a plaintiff recovering less than 40s. damages in any personal action should have no costs ; but that is not so, he is only deprived of costs when the judge declines to certify."

Our Common Law Procedure Act (see 324) repeats this enactment in the same terms. By our Ontario Act (31 Vic. ch. 24) the C. L. P. (see 325) is repealed and this clause enacted :

"If the plaintiff in any action of trespass, or trespass on the case, recovers, &c., less damages than \$8, such plaintiff shall not be entitled to recover, in respect of such verdict, any costs whatever, unless the judge, &c., certifies on the back of the record, in the form hereinafter prescribed, to entitle the plaintiff to full costs, and in case such certificate be not granted, then the defendant shall be entitled to set off his costs, &c., unless the judge shall certify that defendant is not entitled to recover his costs against the plaintiff. Sec. 3." The certificate may be as follows :—

"I certify to entitle the plaintiff to full costs," or, "I certify to prevent the defendant deducting costs."

It appears to me that this statute has made a material change in the law, at least, as regards actions of slander. The distinction taken in the English courts was that the certificate prevented the operation of the 40s. clause, which prevented the recovery of any costs, leaving plaintiff to recover under the statute of James as much costs as he had recovered damages; but I feel satisfied that if the act had said unless the judge should certify that he is entitled to full costs, the court would assuredly have decided that he would get full costs, *non obstante* the statute of James.

Our local act is clear on this. The certificate is not confined to certifying that a right was involved, or that the grievance was wilful and malicious, but that the plaintiff is entitled to full costs.

Sampson v. McKay, a very late case, L. R. 4 Q. B. 645, was an action for slander and £3 verdict. It turned upon 30 & 31 Vic. ch. 142, sec. 5, which enacted that "if in any suit in the supreme court plaintiff recovered not exceeding £20 in contract and £10 in tort, he shall not be entitled to any costs of suit, unless the judge certify there was sufficient reason to bring the action in the supreme court, or unless the court or judge in chambers shall by rule or order allow such costs." The judge refused to certify, and the court was applied to. Cockburn, C. J., said that sec. 5 was general in its terms and applied not only to actions that could be brought in the county courts, but to all actions of tort, including slander. The court concurred with the judge in refusing costs.

Gray v. West (L. R. 4 Q. B. 175), was on a verdict for £10 in slander. There the judge certified, and the court decided that as the plaintiff had recovered an amount much beyond what would have entitled her to costs under the general law applicable to slander in the superior court, and as she could not have sued elsewhere, she ought to be allowed her costs.

In *Craven v. Smith*, (L. R. 4 Ex. 147), the jury, in slander, gave £5. The under-sheriff, before whom damages were assessed, thought he had no power to certify, but said he would have done so if he could.

The court held that this Act, although a County Court Act, applied to all actions, and they made absolute a rule for costs.

All these cases are on the same act.

I think our statute enables the judge to certify for full costs.

The fact of a justification of the slander being pleaded makes no difference in the application of the Statute of James : *Halford v. Smith*, 4 East, 567.

In the view I have taken, it is unnecessary to notice the question on which the argument almost wholly turned whether the character of the defamatory words took the case out of the statute.

GWYNNE, J.—I concur in the judgment just read by his Lordship, the Chief Justice, that under a certificate for full costs, under the Statute of Ontario, 31 Vic. ch. 24, the plaintiff is entitled to tax full costs of action ; but upon the other point contended for by Mr. Read, namely, that the plaintiff is entitled to full costs without a certificate, upon the ground that some of the words mentioned in the declaration are not actionable without the special damage laid, I am of opinion that he is not. This case is quite distinguishable from *Saville v. Jardine*, 2 H. Bl. 531. There the declaration contained five counts, three of which were for words actionable in themselves, and two for words which were only actionable by reason of special damage laid, and the verdict being, on the whole declaration, for 1s., it was held that some portion of those damages *must be* attributed to *the counts* on the words which were only actionable by reason of the special damage, and must therefore have been given *for* that special damage, and that therefore the plaintiff was entitled to full costs, notwithstanding the Statute of James ; but here *all* the words, namely, those actionable *per se*, and those actionable only by reason of special damage, are comprised in the *same counts*, and the pleas were not guilty, and a plea of justification only as to the words which were actionable *per se*. The presumption, therefore, which was

held to arise in *Saville v. Jardine*, does not arise here ; for as each count in the declaration contains words actionable *per se*, they will support the verdict, although the other words may never have been proved. There is no *necessity*, therefore, for *presuming* that any part of the 1s. damages, for which the verdict was rendered, was given for special damage, as there is where the declaration contains a *count* for words not actionable except by reason of the special damage and the verdict is general. The rule of decision in *Saville v. Jardine* is, that where there are several *counts* and a general verdict for the plaintiff for damages, some portion of the damages must be attributed to each count ; but here each count contains *words actionable in themselves*, and they support the verdict without the aid of the special damage laid. The statute of James, therefore, would apply but for 31 Vic. ch. 24.

GALT, J., concurred.

Rule discharged.

CITY BANK V. SMITH.

Bank cheque—Plea of not the holder—Insolvency—Jus tertii.

A., a private banker, exchanged cheques with B., for mutual accommodation. A. used B.'s cheques. A cheque of A.'s had been dishonoured, and the holder called at A.'s office same day, and a clerk in ordinary course of business gave the holder B.'s cheque to pay the dishonoured cheque. Next day A. stopped payment: *Held*, that the holder could recover against B. on his cheque.

Held, also, that under plea of not the holder, B. could not set up any supposed right in A.'s assignee, nor possibly under any pleading on these facts.

Held, also, following *McWhirter v. Thorne*, 19 C. P., 302, that the transfer was not a fraudulent preference within the Insolvent Act.

THIS was an action tried before Galt, J., at the last Assizes for the county of York, without a jury. The declaration was on a cheque drawn by the defendant on 22nd

February, 1869, on the Bank of Toronto, payable to bearer, which plaintiffs presented for payment and which was dishonoured.

Pleas: 1. That defendant did not make the cheque.
2. That the plaintiffs were not the lawful holders.

There was a third plea, on equitable grounds, but as the court held it unsupported by the evidence, it is omitted.

Issue.

It appeared in evidence at the trial that on 22nd February, 1869, defendant gave the cheque sued on to one Magson, a clerk of W. R. Brown and Co., carrying on business, as bankers, in the City of Toronto, and received in return two cheques drawn by W. R. Brown and Co., on the Royal Canadian Bank, one for \$473 and the other for \$275. These cheques were not presented.

Magson gave evidence as follows:—

“Was clerk with W. R. Brown and Co. I received the cheque sued on and gave the exchange cheques on 22nd February. Mr Brown failed on 23rd, the day following. The assignment was made on that day. Our cheques were refused by Royal Canadian Bank on 22nd. I did not hear of any being refused on 21st. There were none honoured on the 22nd. The cheques were exchanged between 9 and 10, a.m. I saw Mr. Smith about an hour after the cheques were given: he came in again. When he came in again we had the cheque now sued upon still in our own hands. He asked the reason why Brown’s cheques were refused. He did not ask for this cheque. He came again in the afternoon. He did not ask for this cheque then. He brought nothing with him. He did not ask for this cheque that day. We parted with the the cheque between 3 & 4, p.m. to Mr. Moat, Manager of plaintiffs’ branch. Mr. Brown himself was in New York. I had no instructions respecting it. When Smith came back the second time I offered to give him his cheque back if he brought those given in exchange. He said he could not do it as they had passed into other people’s hands. Did not hear him say that he

would bring them. I do not think he brought the cheque back that day. I believe he came the following day : the bank was then closed. I gave the cheque in exchange for one of W. R. Brown and Co.'s, held by the City Bank, for \$800. Mr. Moat (Manager of plaintiffs' branch) held a cheque of Brown and Co. for \$800. It had been refused at the Royal Canadian Bank : it is dated 20th February. He brought it back on the 22nd, and I redeemed it by giving J. E. Smith and Co.'s cheque and \$50 in cash. He told me that the \$800 cheque had been dishonoured. I did not know at that time that the bank would be closed next day : it was during the evening that I heard such would be the case. I knew at this time that the Royal Canadian Bank were refusing our cheques, and that the cheque, which I had given the defendant, would not be honoured. Mr. Moat made no remark when I gave him Mr. Smith's cheque : he asked for payment and I gave him the cheque."

On cross-examination he stated, "I had no idea of the bank stopping payment when I gave the cheque to Mr. Moat. I principally had the management of Mr. Brown's business in his absence."

W. C. Chewett, stated : "I was a partner in W. R. Brown and Co.'s. We virtually stopped payment on 22nd February. I was in the bank on that day about 10.30. I gave no instructions at that time to Mr. Magson : I did so shortly after 12. I told him to receive no deposits, to issue no drafts, and to do no new business, but that he might buy and sell any American bills and silver and pay any of our depositors' cheques that might be presented. I knew nothing of the Smith transaction until late that day. When I found it out, I told him that he had done wrong. I afterwards applied to Mr. Moat for the cheque."

On cross-examination he said, "I did not on that day think we were insolvent." On re-examination he stated, "It was about 3 o'clock I told Mr. Magson that we would not open next day. If the cheque was transferred after that hour, it was after I had told him."

Magson, being re-called by plaintiff, said, "The cheque was transferred before Mr. Chewett told me that we would close next day."

John Moat, called by plaintiffs: "I received the cheque for \$750 and \$50 in bills on 22nd February: this was in exchange for one of \$800 which we held. It was about 3 o'clock I received the cheque. I did not believe Brown and Co. to be insolvent at that time."

At the close of the case counsel for defendant contended that *Magson* had no authority to transfer this cheque after *Chewett's* instructions, and that it would pass to Brown's assignee; also, that the transfer from *Magson* to *Moat* was a fraudulent preference, and consequently that plaintiffs were not the lawful holders of the cheque.

A verdict was rendered for plaintiffs, with leave to defendant to move to enter a verdict for him on such issue as the court might think him entitled to, or to enter a nonsuit.

McMichael obtained a rule on the leave reserved, or for a new trial on the law and evidence.

J. H. Cameron, Q. C., and *Read*, Q. C., shewed cause, citing *Story Agency*, secs. 114, 471; *Parr v. Eliason*, 1 Ea. 92; *Moor v. Borthrop*, 1 B. & C. 5; *Newnham v. Stevenson*, 15, Jur. 360; *Raphael v. Bank of England*, 17 C. B. 174.

McMichael, contra, cited *Emmett v. Tottenham*, 8 Ex. 884; *Law v. Parnell*, 7 C. B. N. S. 282.

[The Chief Justice referred to *McWhirter v. Thorne*, 19 C. P. 302.]

GALT, J.—The only plea to which it is necessary to call attention is the second, because the plaintiffs proved the issue on the first plea, and the defendant failed in proving the statements made in the third plea.

The second plea is, that the plaintiffs are not the lawful holders of the cheque, and the ground relied upon by the defendant to establish this plea is that the delivery of the cheque to the plaintiffs was a fraudulent preference and, therefore, void under the provisions of the Insolvent Act

of 1864, section 8, sub-section 4, as being a transfer of a valuable security given, by way of payment, by a person in contemplation of insolvency, whereby the creditor obtained an unjust preference over the other creditors, and that as such transfer was made within thirty days next before the execution of the deed of assignment in insolvency, it shall be presumed to have been made in contemplation of insolvency; and further, that the person by whom the delivery of the cheque in question was made had no authority to make the delivery, and in doing so acted against the instructions given to him by his employers.]

I propose to consider the latter objection first.

[His lordship here recapitulated the substance of the evidence given by Magson and Chewett at the trial, and then proceeded:]

It is evident that Mr. Chewett had given no particular directions respecting this cheque, because he states that he knew nothing of the Smith transaction until late that day; but even if he had given positive instructions to Magson not to part with the cheque, I am of opinion that if the latter had, in the ordinary course of business, transferred the cheque to a *bonâ fide* holder, the latter would have a good title to it as against the employer, for it would be contrary to all principle to sanction a party in holding out a person as his agent, with full authority to transact his business, and at the same time to affect third parties with notice of any secret instructions which he might have given to the agent. It is not necessary, however, to act upon this principle in the present case, because no instructions could have been given regarding the cheque now in dispute, as it had been transferred before Mr. Chewett knew of the transaction, or, if he did know of it, before he spoke to Magson on the subject. This disposes of the latter branch of the defendant's contention.

The question of the transfer being void, as being in contravention of the Insolvency Act, remains to be considered.

Mr. Moat, the manager of the branch of the City Bank in Toronto, proves that the plaintiffs held a cheque of

W. R. Brown & Co. for \$800, which had been returned to them dishonored; that he took the cheque to the office of W. R. Brown & Co. and received in return \$50 in money and the present cheque for \$750; that it was about 3 o'clock in the afternoon when he called at the office, and he swears he did not believe W. R. Brown & Co. to be insolvent at that time. Mr. Magson, in his evidence, states that he gave the cheque to Mr. Moat as above stated, and in his cross-examination avers that he had no idea of the bank stopping payment when he gave the cheque to Mr. Moat. The construction of the 4th sub-section of section 8 of the Insolvency Act was lately before this court, in Hilary Term last, in the case of *McWhirter v. Thorne*, and applying the principle laid down in that case to the present, it seems to me clear that the first objection also fails, and therefore that this rule should be discharged.

HAGARTY, C. J.—I agree with the result arrived at by my brother Galt,

I consider the transfer of the cheque to plaintiff was a *bond fide* transaction for good consideration, in the ordinary course of business between parties, not in contemplation of insolvency.

The defendant had given this cheque to Brown & Co. for the purpose of being used by them in their business: he had taken their cheques instead, and had made use of them for his own purposes.

So long as Brown's counting house was open for business, I think all ordinary dealings in good faith should be protected. The plaintiffs' cashier comes and shews a dishonoured cheque, and requires a settlement. The clerk, for the protection of his employer's credit, at once gives him the defendant's cheque, and thus relieves them from the dishonoured cheque. To any business firm, even faintly careful of their credit, this certainly ought to be a very good consideration for the transfer of a negotiable security.

As to the defence of a liability to the assignee in insolvency, I hardly consider we are necessarily called on to

decide it on the facts before us. Had we so to do, I think we would feel bound to act on the law laid down in *Biddle v. Bond* (6 B. & S. 225) as governing the principle on which the title of a third person can be set up. That was a case of bailment. Blackburn, J., says: "We agree in what is said in *Betteley v. Reed*, that to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another who makes no claim or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever." Nor is it enough," he continues, "that an adverse claim is made upon him, so that he may be entitled to relief under an interpleader. We assent to what is said by Pollock, C. B., in *Thorne v. Tilbury*, that a bailee can set up the title of another only if he defends upon the right and title and by the authority of that person. Thus restricted we think the doctrine is supported both by principle and authority."

The law is stronger against a mere bailee: but there seems to be no reason why a like principle should not apply where a man resists payment of a note or bill on the ground that some other person has a better title than that of plaintiff. Were it otherwise he could resist successfully the plaintiff's claim, and possibly never be called on to pay any one else.

I have given the defendant the benefit of considering his defence as if it were properly before us on the issue joined. I must not be considered as holding that it is so.

The equitable plea was clearly not proved at trial. Nothing then would remain but the issue that plaintiffs not the holder. I do not see how the defence can arise thereunder.

If the defendant's view be correct, the effect of such a traverse would be infinitely extended. The effect of such a plea is fully considered in such cases as *Ancona v. Marks* (7 H. & N. 686), cited in *Coats v. Kelty* (27 U. C. 284). See also *Ross v. Tyson* (19 C. P. 297). It puts in issue no doubt that plaintiff neither actually nor constructively

held the note when the suit was commenced. But granting that he did so hold it, it seems far beyond its province to admit proof of a title to the note superior to that of plaintiff, or existing in some other persons.

I refer to *Byles on Bills* (1866), 416 citing *Uther v. Rich* (2 P. & D. 579).

GWYNNE, J.—The case appears to me to be simply this : There are two pleas to the declaration; one, that the plaintiffs were not the lawful holders of the cheque declared upon, and a special plea, upon equitable grounds, upon the facts alleged, in which the defendant contended that the property in the cheque sued upon had passed to the assignees of Brown, an insolvent. Now, whether that was a good or a bad plea matters not, because, upon the evidence, the issue in fact joined upon it has been, and, as I think, properly, found against the defendant. There was no evidence offered which in law was competent to affect the plaintiffs' right to recover upon the plea, that they were not lawful holders. The contention of the defendant, in substance, now is, that under that plea it was competent for the defendant to shew that the rightful property in the cheque had passed to Brown's assignee in insolvency. That in my judgment is not so, and no case was cited in support of it; but admitting, for the sake of argument, the defendant's contention to be well founded, it could not avail him upon this record, for it is in assertion of that contention that the plea upon equitable grounds has been pleaded, which plea has been properly found against the defendant. How then could there exist upon the same record a verdict in favor of the defendant upon one plea, not setting forth special facts, but assuming them to have been established in evidence, when there is another plea upon the record, specially setting forth the same facts, which has been found in favor of the plaintiffs? I can see nothing in the evidence which would justify us in setting aside the verdict, or in any manner affecting the plaintiffs' right to recover in this action.

Rule discharged.

KASTNER V. WINSTANLEY.

Offer to become security—Guarantee—Construction.

A guarantee should be construed as all other contracts, not strictly as against either side, but by collecting the real intention of the parties from the instrument and the surrounding circumstances, taking the words in their ordinary sense, unless by the known usage of trade they have acquired a peculiar meaning.

In this case it appeared that one H., requiring some proof spirits for the purposes of a trade carried on by him, received from defendant, a friend of his, a letter of introduction to plaintiff, a distiller, to whom defendant was well known, but H. an entire stranger, though, as well as defendant, living in his neighbourhood. There had not been, as far as appeared, any previous application by H. to plaintiff for a credit, nor had the latter declined dealing with him without a guarantee. The letter to plaintiff was as follows: "The bearer is Mr. Joseph Hugill, a friend of mine, who wishes to purchase some proof spirits, which he hears that you manufacture. If you can arrange matters to your mutual satisfaction, I am sure that Mr. Hugill will prove a very reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for":

Held, upon the authority of *McIver v. Richardson*, 1 M. & S. 557, that this letter did not import a perfect and conclusive guarantee in itself, but that to make it such it was necessary that plaintiff should have notified defendant that he accepted the proffered guarantee, and that he had given or meant to give credit to H. on the strength of it.

DECLARATION upon an alleged guarantee, from defendant to plaintiff, on behalf of one Hugill, to pay for all goods that plaintiff might from time to time furnish the latter, averring the supplying of goods and non-payment.

Defendant pleaded several pleas, but the only one material to be noticed was the first, which was a denial of the alleged guarantee, on which issue was joined.

At the trial, before Wilson, J., at Stratford, in October, 1869, the document, upon which the plaintiff's action was founded, was produced and proved. It was as follows:

"MITCHELL, 25th June, 1868.

"P. KASTNER, Esq.,

"Dear Sir:—The bearer is Mr. Joseph Hugill, a friend of mine, who wishes to purchase some proof spirits, which he hears that you manufacture. If you can arrange matters to your mutual satisfaction, I am sure that Mr.

Hugill will prove a very reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for.

"Yours truly,

"E. WINSTANLEY."

At the close of the case defendant's counsel moved a nonsuit upon the ground, among others, that the document produced was not a complete guarantee, but only a proposal tending to a guarantee, which required plaintiff to give notice to defendant of its acceptance before defendant could be charged under it.

The learned judge ruled that the document produced was a complete guarantee, and that it was a continuing guarantee, leave being reserved to defendant to move to enter a nonsuit or a verdict.

The jury found for plaintiff.

Robinson, Q.C., obtained a rule upon the leave reserved.

McCullogh shewed cause, citing *Addison* Cont., last ed., 15, 555, 563, 564; *Jenkins v. Ruttan*, 8 U. C. 625; *Kenaway v. Treleaven*, 5 M. & W. 498; *Jones v. Williams*, 7 M. & W. 493.

Robinson, contra, cited 2 *Smith*, L. C. 45; *McIver v. Richardson*, 1 M. & S. 557; *Gaunt v. Hill*, 1 Stark, 9; *Shaw v. Vandusen*, 5 U. C. 353; *Wood v. Priestner*, L. R. 2 Ex. 66, 282.

GWYNNE, J.—The defendant contends that he is entitled to have the verdict entered for him, for he contends that the document produced is not a complete guarantee, but only an expression of his willingness to become such, if required, and that consequently it had no binding effect without notice of its being accepted by the plaintiff, and that he meant to give credit to Hugill upon the footing of it; and further, that if it be a guarantee, complete without such notice, it is only such for one transaction, and not continuing.

In *Nicholson v. Paget* (1 Cr. & M., at p. 52), Bayley, J., says: "A contract of guarantee is a contract of a peculiar description, for it is not a contract which a party is entering into for the payment of his own debt or on his own behalf, but it is a contract which he is entering into for a third person; and we think it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself." And again, at p. 54: "It is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee the extent to which he expects that the liability is to be carried." Although the soundness of the decision of the court in that case, upon the construction of the guarantee, is admitted in subsequent cases, yet the *rule* of construction laid down is disapproved of in *Mayer v. Isaac* (6 M. & W. 612), and recently in *Wood v. Priestner* (L. Rep. 2 Ex. 70-71).

In *Mason v. Pritchard* (12 East. 228) it is said that, in construing guarantees, the words are to be taken as strongly against the party giving the guarantee as the sense of them will admit of. In *Mayer v. Isaac*, Alderson, B., says, "If I were obliged to choose between the two conflicting principles which have been laid down on the subject, I should rather be disposed to agree with that given in *Mason v. Pritchard* than with the opinion of Bayley, B., in *Nicholson v. Paget*." In *Wood v. Priestner*, *supra*, Martin, B., says, "I cannot assent to the opinion, expressed by Bayley, B., in *Nicholson v. Paget*, that a contract of guarantee ought to be read in *any peculiar* way; I think it should be read *in the same* way as any other contract." And Kelly, C. B., says: "The question in these cases depends not merely on the words, but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction. It is therefore necessary to look at the existing state of things, and looking to that to con-

strue the words in such way as we consider most consistent with the intention of the parties ; not, indeed, considering any statement of either party as to what he meant by the words used, but taking the words themselves, together with the surrounding facts, as the exponents of the meaning of both."

The true rule of construction, then, of a contract of this description is, to construe it as all other contracts, not giving a *strict* meaning to the words used against the party using them, nor yet against the party in whose favor they are used, but to collect the real intention of the parties from the terms used in the contract, taking them in their plain, ordinary, and popular sense, unless by the known usage of trade they have acquired a peculiar sense, and from the surrounding circumstances.

The surrounding circumstances, then, in this case appear to be, that the defendant was well known to the plaintiff, while Hugill was not ; that the latter was well known to the defendant ; that the plaintiff carried on the business of a distiller, manufacturing proof spirits, whiskey and high-wines ; that Hugill required some or one of those articles in the way of some trade or manufacture that he carried on, and that he desired to avail himself of his intimacy with the defendant to obtain from him a favourable introduction to the plaintiff, with a view to dealing with him in the purchase of some or one of the articles which he manufactured ; and that all the parties lived in the same neighbourhood. There does not appear to have been any previous application made by Hugill to the plaintiff for a credit, or that the latter declined dealing with him without a guarantee.

The primary object, then, of the letter appears to be, that the defendant should give to Hugill a letter of introduction to the plaintiff, with a view to their making arrangements with each other mutually satisfactory, which should lead to their dealing together. To lead to this end, the defendant gives to the plaintiff the assurance of his good opinion of Hugill. The terms of the letter appear to be most natural to lead to the effecting of this object.

The defendant, addressing the plaintiff, says, "Dear Sir: The bearer is Mr. Joseph Hugill, a friend of mine, who wishes to purchase some proof spirits, which he hears that you manufacture. If you can arrange matters to your mutual satisfaction, I am sure that Mr. Hugill will prove a very reliable person to deal with."

Now, it appears but natural that the defendant should expect that, upon this letter of introduction being delivered, the plaintiff should enquire of Hugill his circumstances and the business he was engaged in, with the view of forming his own opinion whether or not the proposed dealings were likely to be profitable or desirable to be entered into. Then, the letter appears to have a secondary object, apparently to provide only for the contingency of the plaintiff and Hugill not being able to make mutually satisfactory arrangements. The defendant accordingly adds, "I will myself, with pleasure, *become* security for anything he may be disposed to give an order for." Now, whether or not the plaintiff and Hugill should fail to make arrangements mutually satisfactory, the defendant could have no knowledge without notice to that effect being given to him. To treat this, which I read as the secondary object of the letter, as its primary object, is, as it appears to me, to do violence to the intention of the writer, as expressed in the instrument. Decided cases, except in so far as the extracting the principle of construction is concerned, can afford but little assistance in arriving at the decision which ought to be arrived at in any given case of this description, as it is difficult to construe the language of one person at one time, used under certain given circumstances, by a decision upon different language of another person, used at another time under different circumstances; but this case comes nearer to *McIver v. Richardson* (1 M. & Sel. 557) than to any other; and upon the authority of that case, and upon principle, I am of opinion that the letter of the defendant does not import a perfect and conclusive guarantee of itself, but that, to make it such, it was necessary that the plaintiff should

have given the defendant notice that he accepted the proffered guarantee, and that he had given or meant to give credit to Hugill on the footing of it. If I could have formed the opinion that the instrument is in itself a complete guarantee, I could not, without further consideration, arrive at the conclusion that it is other than a continuing one; for the letter certainly points to a continuance of dealings between Hugill and the plaintiff, and the words, "for anything he may be disposed to give an order for," are capable (without any straining) of the construction that these words apply during the continuance of the dealings. That the instrument is capable of this construction renders it the more important that we should be assured of the intention of the party writing it, that he contemplated exposing himself to a responsibility unlimited in amount, and unrestricted as to duration, unless he should receive notice from the plaintiff that he accepted the proffered guarantee, and intended to hold him responsible upon it.

I do not think it reasonable to hold that this instrument, in the terms in which it is expressed, and under the circumstances attending its being written, is a perfect guarantee without the notice alluded to; I think, therefore, that the allegation in the count, that the defendant did agree to become *and did become* security to the plaintiff, is not established, and that the defendant is entitled to have the verdict entered for him, for it is not suggested that the defect could be removed in another action.

HAGARTY, C. J.—I am a little surprised at the strength of the decisions. I should have ruled as the learned judge did at trial in favour of the guarantee.

McIver v. Richardson was decided in 1813. In *Mozley v. Tinkle* (1 C. M. & R. 692), in 1835, Lord Abinger says, "That case has never been impugned, and the present comes clearly within the principle there established." Both cases are quoted as law in the text books down to the 1869 Ed. of *Addison on Contracts*.

I am quite unable to distinguish the case before us. I therefore agree with the judgment of my brother Gwynne.

GALT, J., concurred.

Rule absolute to enter verdict for defendant.

CORPORATION OF THE TOWN OF ST. CATHARINES V.
GARDNER.

Road Co.—Portion of road running through town—Obligation to repair.

Plaintiffs, a joint stock road company, were in operation, in possession of their road and in receipt of tolls several years before the incorporation of the town of Clifton, within which portion of the road in question lay :

Held, following *Regina v. Brown and Street*, 13 C. P. 356, that plaintiffs were still entitled to collect the tolls within the limits of the town of Clifton, notwithstanding the incorporation of that town and the erection of some of plaintiffs' toll gates within the limits of such town.

ACTION for breaking down plaintiffs' toll gates and toll houses.

After the issue of the writ, by consent and order of a judge in chambers, pursuant to sec. 154 Consol. Stat. U. C. ch. 22, a case was stated for the opinion of this court.

The following were the facts agreed upon between the parties :

Plaintiffs were a joint stock company, under 12 Vic. ch. 84, and 14 & 15 Vic. cap. 122, consolidated by 16 Vic. cap. 190, and also by ch. 49 of Consol. Stat. U. C., and constructed their road from the Suspension Bridge to Table Rock, Niagara Falls. The town of Clifton was incorporated, in 1856, by 19 Vic. ch. 63, after the construction of said road, and plaintiffs erected toll gates and collected tolls before, and continued to do so after, the incorporation of the said town and until defendant destroyed said toll gates.

The place where the gates were erected and the road from Suspension Bridge to Niagara Falls were within the limits of the town of Clifton.

Defendant was an officer of the corporation of the town of Clifton, and acted, in the commission of the act complained of, by the direction and under the authority of such corporation.

The question for the opinion of the court was whether the plaintiffs had power to levy and collect tolls within the limits of the town of Clifton against the will of the corporation of said town.

M. C. Cameron, Q.C., for the plaintiffs, cited *Regina v. Brown and Street*, 13 C. P. 356.

Harrison, Q.C., contra, cited *The Port Whitby and Scucog Road Co. v. Corporation of Town of Whitby*, 18 U. C. 40; *McGee v. McLaughlin*, 23 U. C. 90.

The statutes referred to are noticed in the judgment.

HAGARTY, C. J. delivered the judgment of the court.

In case of *Port Whitby and Scucog Road Company v. Corporation of Town of Whitby* (18 U. C. 40), decided in 1859, the plaintiffs were a Road Company under 12 Vic. ch. 86, and 13 & 14 Vic. ch. 14, and registered in 1850. By an order in council, 3rd July, 1852, the road in question was transferred to plaintiffs, it being part of a macadamized road constructed by government from Whitby to Lake Scucog.

The town of Whitby was incorporated in 1854, and a portion of the road fell within its limits. The question was, who was bound to repair the road. It was held that the obligation to repair lay on the town and not on the company; that although the 13 & 14 Vic. ch. 14 imposed generally on the purchasers of the government roads the obligation to repair, the statute ch. 15 of same Session, passed a few days after, created a particular exception to the general provision, and the two acts should be read as one, and the first clause of ch. 15 allowed a proviso to qualify the general terms of ch. 14; that there was nothing in 16 Vic. ch. 190 or in 18 Vic. ch. 28, incorporating the town of Whitby, or in Imperial Act 22 Vic. ch. 99, affecting the question raised.

Regina v. Brown and Street (13 C. P. 356), decided four years later.—It appears that the present plaintiffs' company was sold under a decree in Chancery and defendants Brown and Street became the purchasers; that the road passed through the village of Thorold. It became out of repair, and a Mandamus was asked to compel Brown and Street to keep the road in repair. The court was of opinion that the portion of the road in question was not vested in the corporation of Thorold, and that it belonged to Brown and Street, who were bound to keep it in repair, as the successors of the original road company.

The Queen's Bench decision in the Whitby case was reviewed and it was noticed that the attention of that court had not been drawn to the fact that the 13 & 14 Vic. ch. 15, which applied exclusively to cities and towns, had been repealed by 22 Vic. ch. 99, (A.D., 1858,) sec. 403; that the roads of joint stock companies were not such public roads and highways as the Legislature intended, in case they were in a city, township, town or municipal village, should vest in these municipalities.

The 13 & 14 Vic. ch. 15 is certainly repealed by the sec. quoted in the last judgment, but it seems to me that the C. P. would have decided the case as it did, even if that statute were still in force.

In the case before us the plaintiffs' company was in operation, in possession of this road, and levying tolls thereon several years before the incorporation of Clifton. If defendant's contention be right, the act of incorporation at once divested plaintiffs' interest in all portions of the road lying within the town of Clifton, relieved them from liability to repair and transferred such liability to the town.

We cannot distinguish this case from the decision of this court in *Smith and Brown*, and as no change in the statute has taken place affecting the question since that decision, we think we should follow it and leave the defendants to carry the case to the Court of Appeal, if so advised. We must not be understood as questioning the correctness of that decision.

Judgment for plaintiffs.

COFFEY ET AL. V. THE QUEBEC BANK.

*Sale of goods—Warehouse receipts—Appropriation of goods—Evidence—
Conversion—Trover—Detinue.*

T. sold to plaintiff 2,000 bushels of wheat out of 3,000 bushels owned by him and lying in two bins in the warehouse of S., whose receipts he held for the same, and which he endorsed to plaintiff for the quantity sold to him, receiving from him payment for the purchase. The wheat remained in the warehouse for some time. T. and S. left the country, when defendants seized and converted the whole quantity to their own use, and plaintiff sued them in trover and detinue. The evidence of T., so far from shewing that he repudiated the sale, fully upheld it, and proved that he had told S. to appropriate all the wheat in one of the bins to plaintiff, and S. stated that he would not, after the notice of the sale to plaintiff, have delivered any of the wheat in the two bins to any one but plaintiffs, without retaining enough to satisfy plaintiffs' 2,000 bushels:

Held, sufficient evidence of an appropriation of the wheat by T. in fulfilment of his sale to plaintiff.

Quære, whether defendants, as wrongdoers, could set up the objection of the property not passing by reason of non-appropriation or non-severance.

TROVER, with a count in detinue, for a quantity of wheat.

Pleas.—Property not plaintiffs'; not guilty; and did not detain.

The case was tried at the last Fall Assizes for the county of York, before Galt, J., when a verdict was found in favor of plaintiffs, the jury adding, "and we think that there was a specific appropriation of the wheat."

It appeared from the evidence given at the trial that one Taylor had a large quantity of wheat stored in a warehouse in the city of Toronto, and that from time to time he received warehouse receipts from Scott, the keeper of the warehouse, for the wheat so stored; that the wheat was received into the warehouse in comparatively small quantities, and that Taylor was in the habit of obtaining these receipts as he had occasion to use them; that on the 3rd of February, 1869, Taylor had a considerable quantity of wheat, all of the same quality and description, stored in the warehouse, for some of which he had previously obtained receipts, which had been endorsed to

defendants; that on that day Taylor obtained from the warehouseman a receipt for 2,000 bushels of fall wheat, which, it was proved clearly, were in the warehouse at that time, for which no receipt had previously been given, and which was Taylor's property, and over which the defendants had no claim whatever. It was also proved that on that day Taylor sold 2,000 bushels of fall wheat to plaintiffs, and endorsed to them the receipt, dated the 3rd February, for the purpose of transferring the wheat mentioned in it to them, and that plaintiffs at the same time paid Taylor the purchase money, which purchase money was deposited by him to the credit of his account with defendants, and that defendants were aware of said sale. It was likewise shewn that the wheat sold was stored, according to Taylor's evidence, in the north-west bin of the warehouse, but according to Scott's evidence in two bins, Nos. 1 and 2, which were situated in the north-west corner, and that these bins contained about 3,000 bushels. It appeared further that, so far as Taylor was concerned, he made an appropriation of this particular portion of wheat to fulfil his sale to plaintiffs; but it did not appear that this appropriation was expressly assented to by plaintiffs. It was proved that the wheat, which Taylor had so appropriated, remained in the warehouse until defendants took possession, as hereinafter mentioned, and Scott, the warehouseman, swore that he would not have delivered any of the wheat in bins 1 and 2 to any other persons than plaintiffs without retaining enough in them to satisfy the receipt which he had given for the 2,000 bushels which he knew had been sold to plaintiffs, Taylor having told him that he had sold that wheat to plaintiffs. Some weeks after the sale, namely, in the beginning of the next month, Taylor and Scott absconded, the former having, after the transaction in which plaintiffs were interested, induced the latter to grant false warehouse receipts for wheat which had not been received. It appeared also, that shortly after Taylor and Scott had left the Province,

defendants, by some means or other, obtained possession of the warehouse and converted to their own use all the wheat therein, including the wheat in bins 1 and 2, which had been appropriated in fulfilment of Taylor's contract with plaintiffs.

At the trial the jury were requested by the learned judge to say whether any wheat had been appropriated by Taylor in fulfilment of his sale, and they found, as before stated, that such appropriation had been made.

Anderson obtained a rule to set aside the verdict and to enter a non-suit, pursuant to leave reserved, on the ground that the plaintiffs proved no property in any specific wheat to entitle them to maintain trover; or for a new trial without costs, for misdirection, in ruling that there was evidence on the part of the plaintiffs of sufficient property in them to enable them to maintain trover; and on the law and evidence.

McMichael shewed cause, and *Anderson* supported the rule, citing *Box v. Provincial Insurance Company*, 15 Grant; *Jenner v. Smith*, L. R., 4 C. P. 270; *Aldbridge v. Johnston*, 7 E. & B. 78, 85.

GALT, J.—As there are no circumstances shewn to justify defendants' conduct, in taking possession of the warehouse, and converting the wheat therein to their own use, they are certainly, as regards the plaintiffs, wrongdoers.

Mr. Justice *Blackburn*, in his treatise on the effect of the contract of sale, states the law to be as follows (p. 124): "The parties do not contemplate a bargain and sale till the specific goods, on which that contract is to attach, are agreed upon. When the goods are ascertained, the parties are taken to contemplate an immediate bargain and sale of the goods, unless there be something to indicate an intention to postpone the transference of the property till the fulfilment of any conditions; and when, by the agreement, the seller is to do anything to the goods for the purpose of putting them into a deliverable state, or when

anything is to be done to them to ascertain the price, it is presumed that the parties mean to make the performance of those things a condition precedent to the transference of the property. But, as these are only rules for construing the agreement, they must yield to anything in the agreement that clearly shews a contrary intention. The parties may lawfully agree to an immediate transference of property in goods, although the seller is to do many things to them before they are to be deliverable; and, on the other hand, they may agree to postpone the vesting of the property till after the fulfilment of any conditions they please."

It is manifest that in the present case it was the intention of both parties that the property in the wheat should at once pass from the seller to the purchaser; the quantity was ascertained, the quality was agreed upon, and the purchase money was paid. It was the duty of the warehouseman, and not of the vendor, to measure out and deliver the article in accordance with the receipt which he had given, and consequently nothing remained to be done by the vendor except to instruct the warehouseman that the sale had been made, and to require him to hold the property for the purchaser. I do not consider that the property in the wheat passed to the plaintiff by the endorsation of the receipt, because the contrary has been expressly decided by the Court of Queen's Bench in the case of *Glass v. Whitney* (22 Q. B. 290); but I do consider that as soon as the vendors had notified the warehouseman of the sale and had indicated the wheat which he had appropriated, in fulfilment of it, that the property in that wheat passed to the purchaser. From the evidence it appears that at the time of the sale Taylor had a much larger quantity of wheat in the warehouse than the 2000 bushels sold to the plaintiff, and that it was all of the same quality, namely, fall wheat. It is an undoubted proposition of law that the specific goods must be ascertained before the property passes from the vendor to the purchaser; but it is also well established that an appro-

priation of specific goods to the fulfilment of a contract may be made either at the time of the contract or subsequently. To quote again from Mr. *Blackburn's* Treatise, p. 127: "When the goods are selected from the first in the original agreement there is of course no difficulty on the point: both parties are then bound to apply the contract to those specific goods. Neither is there any difficulty when both parties have subsequently assented to the appropriation of some specific goods, to fulfil an agreement that in itself does not ascertain which the goods are to be. The effect is then the same as if the parties had from the first agreed upon a sale of those specific goods. In the accurate language of Holroyd, J., in *Rhode v. Thwaites* (6 B. & C. 388), 'The selection of the goods by the one party and the adoption of that act by the other converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes.' But the difficulty arises when the original agreement does not ascertain the specific goods, and one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it, and not binding on the other party, unless it was made in pursuance of an authority to make the election conferred by agreement, or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final and irrevocably binding on both parties." In my opinion, when we consider the facts in this case and the situation of the parties, we should hold that the vendor had, by the very nature of the agreement, an authority to make the election, because he had received the purchase money and was bound to deliver the wheat. He would have fulfilled his agreement by the delivery of any 2000 bushels of fall wheat, provided they were in Scott's warehouse at the time of the sale, and the plaintiff could not have objected to receive them in fulfilment of the contract. As the property did not pass simply by the endorsation of the receipt, it was necessary that he should have notified

the warehouseman of the sale, which he did do. This would bring this case within the first branch of Mr. Blackburn's proposition ; but if that were thought not to be so, the evidence proves that he did make an appropriation and that it has never been revoked by him, and the plaintiff has assuredly adopted it. The foregoing circumstances would, in my opinion, be decisive in favour of the plaintiff, if there was no other fact to be considered ; but it is urged, on behalf of the defendant, that the appropriation referred to, even admitting it to have been made, would not avail the plaintiffs, because from Scott's evidence it is shewn that there was a considerably larger quantity than 2000 bushels in the bin designated by Taylor, as he proves that there were 3000 bushels in bins 1 and 2. Without discussing the question how far these defendants, who are wrongdoers, are entitled to raise such an objection, let us examine the evidence to ascertain whether that point is so clearly against the plaintiffs as the defendants assume it to be. Scott swears that there were about 3,000 bushels of wheat in bins Nos. 1 and 2 (these bins were in the north-west corner of the warehouse), out of which Taylor told him the plaintiffs were to receive their 2,000, and that he would not have delivered the wheat in those bins to any other persons than the plaintiffs after the notice which he had received from Taylor. There must therefore have been, at least, 1,500 bushels in each bin, had the quantity been equally divided. Taylor, however, swears that he told Scott to appropriate the wheat in the north-west *bin* (in the singular), and I think that, without going very far, we may, for the purposes of this case, assume that the wheat in the two bins may have been in the proportion of one thousand in one bin and two thousand in the other, and that the latter was the one appropriated by Taylor in fulfilment of his sale to the plaintiffs, particularly in a case like the present, where the defendants appear to have acted most unjustifiably, and to have possessed themselves of property which they knew had been sold to the plaintiffs, and the purchase money for

which had been actually paid over to them by Taylor. The question of appropriation was one of fact for the jury, and they have found it in favour of the plaintiffs. In my opinion this rule should be discharged.

HAGARTY, C. J.—As I understand the case, the defendants took or obtained possession of the wheat in the warehouse, under no claim of right, as against plaintiffs, shewn at the trial.

It seems to me the argument has turned wholly on the absence or presence of certain requisites to vest the property in dispute in plaintiffs, as it would be in a contest between them and the vendor, Taylor; the latter denying and the former asserting that the property had passed. But, as I understand it, there were 3,000 bushels of wheat in two bins in Scott's warehouse: it is not clear how much in each: Taylor held Scott's receipt therefor, and sells 2,000 to plaintiffs, endorsing Scott's receipt for that quantity to them, and plaintiffs thereupon paying the full purchase money to Taylor, the owner; the wheat remains in the warehouse for some time; Taylor and Scott leave the country, and certain persons seize and convert the whole quantity to their own use; Taylor makes no attempt to deny the sale, or to make any claim; on the contrary, his evidence fully upholds it, and he states he had told Scott to appropriate all the wheat in one of these bins to plaintiffs, and Scott swears he would not, after notice of the sale to plaintiffs, have delivered any of the wheat in the two bins, 1 and 2, to any one but plaintiffs, without retaining enough in them to satisfy plaintiffs 2,000 bushels. Had plaintiffs applied to Scott for the 2,000 bushels sold to them, producing his receipt therefor, endorsed to them by Taylor, the receipt would have been satisfied by delivery of any 2,000 bushels from the bins indicated. This would have closed all controversy as between these three parties as to this bargain. As I understand the course of decisions in our courts, it has

been considered that the usage of the trade does not require in wheat contracts that delivery must be made "grain for grain;" that delivery of the stipulated quantity of the article of the quality and character bargained for, generally satisfies the contract. To hold otherwise would deeply embarrass all dealings in the milling business and the shipping and warehousing of grain.

I can hardly see that the act of a wrongdoer, seizing the whole of the grain in the two bins in question, and converting the whole to his use, destroys all right or interest of the plaintiffs in any part thereof. But the defendants say, "You had no interest or property in any thing for us to destroy." Plaintiffs reply, "We had a sale made to us of 2,000 bushels out of the 3,000 you have seized, two-thirds of the whole quantity. We could have been satisfied by delivery to us of any two-thirds of the whole. You seize the whole without any title whatever." When the warehouseman received Taylor's 2,000 bushels of wheat, and gave a receipt for it, he could never excuse himself from delivering it, when required, on the ground that he had mixed it with any larger quantity. The person who stores grain has a right, I think, to consider it as always ready for delivery; and if he sell any quantity specified in a receipt from the warehouseman, I think he has the right to consider it to be ready for and capable of delivery; and when he notifies the warehouseman of the sale, the latter may be reasonably expected to arrange and be ready to deliver when required. In such a view there would be nothing unreasonable in looking on the warehouseman as acting for and under the presumed authority of the vendee in arranging and preparing the goods for delivery, and his appropriation of any specific quantity might fairly be held to be an act done by him for all parties interested: see *Waring v. Langton* (18 C. B. N. S. 331), where Erle, C. J., says, "In many instances the warehouse of the vendor has been held to be the warehouse of the purchaser, in order to carry out the intention of the parties." At all events such a course ought to be unex-

ceptionable, where neither he nor the vendor contests or denies the vendee's right, and the objection is only advanced by a wrongdoer. If defendants' contention be correct, it seems to me its legitimate action would be thus : Ten farmers deliver grain to a warehouseman, 1,000 bushels each, and each obtains his receipt therefor. All the grain is thrown together on a floor or in a bin. After this the warehouseman gives receipts for the whole quantity, or goes through the form of selling the whole as his own to some third person, aware of the previous deposits and receipts or not, as the case may be ; then the warehouse keeper absconds, and the last vendee seizes the whole, and insists that no one of the ten depositors has any claim, as his 1,000 cannot be severed or distinguished. Or again, if A. store 2,000 bushels in one bin, and take two receipts for 1,000 each, and then sell 1,000 to B. and the residue to C., and notifies the warehouseman, who declares that he holds the wheat for these two ; then, if A. sell the whole to D., aware or ignorant of the prior sales, the latter can enter, take the entire quantity, and neither B. nor C. could maintain trespass, trover, or detinue against him. Or again, if a mere wrongdoer seize the entire quantity in either of the cases suggested, the depositors in the first case, and the vendees' in the second, would be equally without remedy.

I incline very much to the opinion that where a wrongdoer seizes the entire quantity, it does not lie in his mouth to raise the objection of non-appropriation or non-severance.

In *Whitehouse v. Frost* (12 East. 618) the point was suggested. Forty tons of oil were in a cistern, ten were sold, and an order given therefor by the owner of the ten on persons having the entire quantity, who had sold the ten to the vendee. The order was accepted by these persons. A bill was given for the ten tons, and prior to its maturity the vendee failed. His assignee brought trover against the immediate vendor. The objection was taken that no property passed. Grose, J., said, "Supposing a

third person had taken the whole forty tons tortiously, could not the vendee have brought his action of trover for the ten tons?" Sir James Scarlett, as counsel, answers, "As against a wrong-doer, perhaps the court would not regard the actual condition of the property. But suppose thirty of the tons were tortiously taken, how could it be told whether the ten which remained were or were not the specific tons belonging to the vendee?" LeBlanc, J.: "The same objection might be made if the vendee had paid for the ten tons." Lord Ellenborough: "Suppose the whole had been distrained for rent due from D. & Co. (the holders of the whole), whose share would cover the rent? And Townsend (the vendee of the ten tons) had brought replevin and recovered, would the sheriff have to measure out the ten tons? I throw it out for consideration: perhaps he would incidentally have the power of dividing it, the quantity being certain. It is a different case where the goods remain in the same hands, as the bailee of the vendee or as the original seller. In the former case the vendor holds them in a new character."

This case has been questioned in *Blackburn* on Sales, 125, in its general result, not as to anything above referred to. I merely cite it for the suggestions made in argument. In *Jenkyns v. Usborne* (7 M. & G. 698) it is laid down that where two persons are entitled to portions of an unsevered quantity, when one has taken his portion, the residue vests in the other, who may maintain trover for a subsequent conversion.

There was no difficulty here between Taylor and Scott, nor between Taylor and plaintiffs. The contract was complete, and the money paid; and if anything then remained to be done, it either was done, as shewn in the evidence, or it could have been readily done but for the unauthorized intervention of the defendants, who seized and appropriated the entire contents of the warehouse, by which proceeding they placed it out of the power of the parties claiming property therein, either under Scott or Taylor, from ascertaining such property.

My impression is, that the questions of Grose, J., and the admissions of Scarlet, shew the true state of the law, and that, as against a wrongdoer, the court would not regard the objections of the non-severance of the quantity sold to plaintiffs from a larger bulk.

It was not suggested that plaintiffs could be in the position of the purchaser of an undivided moiety of a larger quantity, so as to become a tenant in common with others.

I call the defendants wrongdoers, and apply the law to them that seems applicable to wrongdoers, because on the report of this case it appears that defendants did not claim to act on title existing in themselves, but on objections to plaintiffs' title. They stated that they held warehouse receipts for large quantities of wheat in Scott's warehouse, but they did not attempt to set up a title superior to plaintiffs', and, as a chartered bank, might have found it difficult to shew title for seizing the wheat in the warehouse. I think this is a case pre-eminently calling upon us to be astute in endeavouring to shew that the law is not so powerless as to afford no remedy for a wrong so great as plaintiffs have suffered at defendants' hands.

I think, on the point in evidence as to the appropriation, it may be in our power to support the verdict. If that be insufficient, I incline to think that it may still be supported on some of the principles to which I have adverted.

GWYNNE, J.—The question we have to decide is, whether the plaintiffs, who, at the time of their purchase of the wheat, which is the subject of this action, *bonâ fide* paid cash in full for the wheat to the person who was the absolute owner of it, shall or not lose both the wheat and the price paid for it, for the benefit of the defendants, who, in so far as this action is concerned, have no property in the wheat, nor any right to possession of it, except such as they may have acquired by a tortious taking possession of it, upon the suggestion that the property in the wheat never passed from the vendor to the vendee, between whom there is not and never has been any dispute as to the vendee's right of property in the wheat.

The verdict which has been rendered for the plaintiffs accords with the principles of moral justice, and I think it can be supported without the violation of any principle of law. It is gratifying to find any means of escape from the position of being compelled to admit, as I think we should be if we should feel ourselves constrained to yield to the contention of the defendants, that in this case the principles of law invoked would be utterly and diametrically opposed to the principles of morality and justice.

It appears in evidence that Taylor, the owner of the warehouse receipt, dated the 3rd of February, 1869, on the same day, or on the day after that receipt was given, sold the wheat, viz., 2000 bushels mentioned in that receipt, to the plaintiffs, for cash then paid by the plaintiffs, and which cash was thereupon immediately paid by Taylor to the defendants, who were well aware of the fact of the sale to the plaintiffs, and that the moneys so paid to them were the proceeds of such sale; that at the time of this sale Taylor, to the knowledge of the defendants, handed over the warehouse receipt to the plaintiffs, with a delivery order thereon endorsed, signed by him, in the words following, "Deliver to L. Coffey & Co. (the plaintiffs), or order, in store;" that immediately after, upon the same day that the wheat was sold to the plaintiffs, the vendor informed the warehouseman, who held the wheat in store, that he had sold the plaintiffs 2000 bushels of fall wheat, and at the same time directed him to give to the plaintiffs, in fulfilment of this sale, the wheat in the lower bin in the north-west corner of the storehouse No. 2, in which the wheat designated in the warehouse receipt was stored. Scott, the warehouseman, whose evidence was taken under a commission, in answer to a question put to him, as to the number of bins in this warehouse, and as to the quantity of wheat in each, says that there were in the warehouse six bins, namely, on the *lower* floor three bins; that in number 1 and 2, *north-west bin and passage*, there were 3000 bushels, and he says that the wheat referred to in the warehouse receipt in question was in

bins one and two. In answer to a question, whether after the 3rd day of February, 1869, and the giving of the warehouse receipt he received any fall wheat into the same warehouse No. 2, referred to in the warehouse receipt, and if he did, whether he mixed such wheat with the wheat referred to in the warehouse receipt, or kept it distinct therefrom, he answered, that he did receive other fall wheat from Taylor, but that he did not mix it, because *the bin was full*, and Taylor ordered him not to mix the wheat *in that bin, as it had been sold to Mr. Coffey*. Being asked *vivâ voce* what he meant by saying bins one and two were full, and that was the reason why he did not put more wheat in, and then afterwards stating the reason was, that Taylor had sold the wheat to Coffey, he answers that he intended to cut a hole in the upper floor, which would have enabled him to put some more wheat in, but that he did not do so when Taylor told him it was sold to Coffey, and was to be kept separate. Being again asked *vivâ voce* how many bushels were there in bins one and two, he answers, "*about 3000.*" Now, I see no reason for laying any stress upon any supposed discrepancy between the evidence of Taylor and Scott as to the situation in the warehouse of the wheat sold to the plaintiffs, namely, whether it was in one bin or in two bins. Taylor says that he directed Scott to deliver to the plaintiffs the wheat "*in the lower bin,*" (by which I understand the bin on the *lower* floor of the warehouse), "*in the north-west corner of the storehouse.*" Now, there is nothing to shew that Taylor knew that in this north-west corner there were in fact *two* bins, so as to raise a doubt as to which of the two was intended. Then by Scott's evidence we find that he designates bins Nos. 1 and 2 on the lower floor as "*north-west bin,*" which is quite consistent with the expression made use of by Taylor, namely, "*the lower bin in the north-west corner.*" Scott says, "In Nos. 1 and 2 (on the lower floor), the "*north-west bin and passage, there were 3000 bushels.*" Nor can I see any reason for laying any stress upon any supposed discrepancy between one part of Scott's testimony and another as to

the contents of this north-west bin. In one part of his evidence he says, that in bins Nos. 1 and 2, that is, in the north-west bin on the lower floor *and passage* there were 3000 bushels, and when the question was repeated *vivâ voce*—how much wheat there was in bins 1 and 2?—he replies “*about 3000 bushels.*” Now, I do not think it unreasonable to conclude that Scott’s intention was simply to repeat the answer he had already given, namely, that in the bins Nos. 1 and 2, which he calls the north-west bin *and passage*, there were about 3000 bushels. Upon the whole evidence I think the jury might reasonably infer that Scott had no difficulty in understanding what Taylor meant when he told him to keep the wheat in the bin in the north-west corner to represent 2000 bushels sold to the plaintiffs, and that that bin was that which Scott calls the “the north-west bin,” composed of bins Nos. 1 and 2 spoken of by him, and that the north-west bin, so composed, contained precisely or almost precisely the 2000 bushels, leaving the balance between that quantity and the “3000 bushels,” or “about 3000,” to be contained *in the passage* adjoining, and so that they were justified in concluding that the wheat sold to the plaintiffs was so separated and set apart from the residue as to constitute a complete appropriation of a particular bulk of wheat for the plaintiffs; and the jury having so found, I am prepared, as a proposition of law, to hold that Taylor, having sold to the plaintiffs the 2000 bushels mentioned in his warehouse receipt, and having thereupon received the full price therefor, and having transferred to the plaintiffs that receipt, with the delivery order thereon endorsed, and having communicated the fact of this sale to the warehouseman, and having directed him to keep the wheat in his north-west bin to represent the wheat sold to the plaintiffs, and the warehouseman having accepted the duty involved in that direction, *he* thereupon became bailee of that particular wheat for the plaintiffs, and so there was such a separation of this particular parcel of wheat as constituted a delivery of the 2000 bushels sold to the plaintiffs, so as to pass the

property therein completely to them and to give them a good cause of action against the plaintiffs for the conversion of that wheat; and if the further consent of the plaintiffs to that appropriation was necessary, I think *that* also may reasonably be inferred from the fact of the plaintiffs having without objection suffered the wheat to remain in the custody of the warehouse keeper for seven weeks after they had paid the vendor the purchase money in full. I think, therefore, that the verdict may be supported upon the principle of the decision in *Aldridge v. Johnson* (7 El. & B. 885); and finding, as I do, upon the finding of the jury in this case, the existence of those facts which were wanting in *Jenner v. Smith*, namely, the setting apart by the vendor and the delivery by him to the warehouseman of a particular separate parcel of wheat, to represent the contract, and the acceptance by the warehouseman of that separate parcel for the purchaser, I think this verdict may be supported upon the principles announced by the court in *Jenner v. Smith* (L. Rep. 4 C. P. 270), as sufficient to pass the property if like facts had existed there. This verdict might perhaps, also, if it were necessary, (but for the above reasons I do not think it is necessary) be supported upon another principle. I allude to that referred to by his lordship, the Chief Justice, namely, that the necessities of the trade may justify us in holding, for the protection of *bond fide* purchasers of grain of this description, or any other similar article stored in a public warehouse, and not perhaps conveniently capable of separation until finally removed from the warehouse, and which the purchaser therefore may wish to remain after the purchase in bulk as before the purchase, awaiting a favourable market, or, it may be, awaiting the opening of navigation for shipment abroad, that when the vendor of a part, who is paid in full, or the vendee, in possession of a receipt with a delivery order endorsed thereon, communicates the particulars of the sale and purchase to the warehouseman, *he eo instanti* becomes the bailee for the purchaser of an undivided part of all the property of a like description and quality of the

vendor then in the same warehouse, in the proportion which the parcel sold bears to the whole bulk of the like article of the vendor then held in store by the warehouseman, so as to enable the purchaser, without any separation of his particular quantity, to maintain trover against a person who tortiously converts the whole bulk.

Rule discharged.

MANDER V. ROYAL CANADIAN BANK.

Deposit receipt for money—Delivery to another—Payment after notice—Equitable pleadings.

To an action on the common money counts and account stated defendants pleaded, by way of equitable defence, setting out a deposit receipt for moneys from them to plaintiff, to be accounted for by them to plaintiff, and, in substance, that plaintiff had, for good and valuable consideration, transferred all his right, title, and interest in equity to receive and demand payment of the fund, which defendants had paid over to the transferee.

Replication, on equitable grounds, in effect, that defendants did not *bona fide* pay amount of claim to a person or persons to whom plaintiff had, for good consideration, transferred all his right, title, and interest in equity, to receive and demand payment of the fund, but that he parted with the security under circumstances which, at best, gave the transferees an equitable charge upon the fund, whose extent had to be determined by certain acts to be done by them, and that they having taken no steps to ascertain the extent of the charge, plaintiff, before the alleged further transfer by them to certain parties (set up by the plea) and before payment by defendants, notified them that he disputed the validity of the equitable charge, and not to recognize it or pay any of the fund in respect of it, which defendants agreed not to do, but afterwards paid the same :

Held, a good replication.

Deposit receipts for money, given by a bank, are not negotiable instruments in equity any more than at law, so as to entitle the holder to demand payment of the fund secured by them.

ACTION upon the common money counts and account stated.

Pleas, by way of equitable defence—1. That the moneys sued for were deposited by plaintiff with defendants, as bankers, upon a bank deposit receipt in the words following :—

"No. 159. Royal Canadian Bank.

"WOODSTOCK, 7th January, 1869.

"\$5443.

"Received from John Manders, of Cohoes, New York, five thousand four hundred and forty-three dollars, which sum shall be accounted for by this Bank to the said John Manders, and will bear interest at the rate of four per cent. per annum, provided the money remain not less than three months from date of deposit: fifteen days' notice to be given of its withdrawal, on which notice interest shall cease.

"For the Royal Canadian Bank, J. M. BURNS, Agent."

That afterwards the plaintiff, for good and sufficient consideration, duly transferred the said receipt and all his right, title and interest at law and in equity to the said moneys and interest by endorsement on said receipt and delivery thereof to certain persons trading under the name and firm of A. D. Shepherd & Co., and plaintiff endorsed his name on the said receipt and delivered the same to A. D. Shepherd & Co., with the intention of passing and did thereby pass all plaintiffs' right and title to the moneys and interest by the receipt represented to A. D. Shepherd & Co., who accordingly thereupon gave due notice thereof to defendants; that Shepherd & Co. afterwards transferred all their right and interest in the said moneys and delivered the said receipt to William B. Mann & Co., who thereupon then gave defendants due notice thereof, whereby Mann & Co. became legally and equitably entitled to the moneys and interest specified in the receipt: that afterwards Mann & Co. presented the receipt to defendants for payment and demanded payment thereof, and defendants thereupon and before the commencement of this suit paid Mann & Co. the said moneys and took up the deposit receipt and still held the same, whereby defendants became and were discharged from all liability and responsibility in respect thereof.

Replication, upon equitable grounds, that plaintiff endorsed and delivered the deposit receipt to Shepherd & Co.,

in consequence of a threat made by them to prosecute a son of the plaintiff's upon a charge of embezzlement, and as a security only for such sum as should be found to have been embezzled by plaintiff's son from said firm, and upon the faith and express agreement that the said firm would not part with receipt, but would hold the same as security as aforesaid until such time as it should be ascertained whether or not plaintiff's son had embezzled any and what sums from Shepherd & Co., and for such sum only as he should, upon examination, be found to have embezzled, said firm at the same time agreeing not to prosecute plaintiff's son criminally; that it had not, before this action, been found that plaintiff's son had embezzled any sum from said firm; that afterwards Shepherd & Co., in fraud of said agreement, endorsed receipt to Mann & Co., for the purpose of collecting the same for the benefit of Shepherd & Co., said Mann & Co. having full knowledge of all the facts aforesaid; that before such endorsement by Shepherd & Co. to Mann & Co., plaintiff duly notified defendants of all the facts above in the replication set forth, and notified them not to pay the amount to any person but plaintiff, and defendants, before paying Mann & Co., expressly agreed with plaintiff not to pay same to any one but plaintiff, and admitted that they held the moneys to plaintiff's use, but afterwards, in violation of that agreement, paid same to Mann & Co.

Second plea, by way of equitable defence, that defendants received the moneys from plaintiff upon the deposit receipt in the belief that they were plaintiff's moneys; that in truth they were not, but were the moneys of Shepherd & Co., from whom they had been feloniously stolen or embezzled, as plaintiff at the time of depositing the moneys with defendants well knew; that Shepherd & Co., having become apprised of receipt, applied to plaintiff therefor, and that he, knowing the premises, transferred receipt and all his right, title, and interest therein (as in the former plea) to Shepherd & Co., who thereupon gave due notice thereof to defendants; that afterwards Shepherd & Co.

duly transferred the receipt and all their right, title, and interest, &c. (as in the former plea) to Mann & Co., who thereupon gave due notice thereof to defendants, whereby Mann & Co. became entitled to receive payment of the moneys represented by receipt and did receive payment, &c., &c.

Replication, upon equitable grounds, identical with that pleaded to the other plea, with the additional averment, that the moneys deposited were plaintiff's own moneys, and had not been the moneys of Shepherd & Co., and had not been stolen or embezzled from them before the receipt thereof by defendants.

To these replications* defendants demurred.

Harrison, Q. C., for the demurrer, contended that the payment alleged in the pleas was a good and valid discharge of the defendants responsibility under the deposit receipt, and that the holder of the receipt was the person entitled to demand and receive payment, the property, upon the authority of *Woodham v. The Anglo Australian Assurance Company*, 3 Giff. 238; 8 Jur. N. S. 148; 5 L. T. N. S. 628, having passed to the transferee by delivery; and that these deposit receipts were negotiable instruments in equity, if not at law. He further referred to *Cochrane v. O'Brien*, 3 J. & LaT. 388; *Key v. Cotesworth*, 7 Ex. 595.

Anderson and Boyd, contra, cited *Glyn v. Baker*, 13 Ea. 509; *Whistler v. Forster*, 14 C. B. N. S. 248; *Forbes v. Western Bank*, 16 Scotch Court Sessions Cases, 807.

GWYNNE, J., delivered the judgment of the court.

Woodham v. The Anglo Australian Assurance Company by no means decides what Mr. Harrison contends it does.

The plaintiff in his bill asserted no such claim: what he did assert was that the delivery of the deposit receipt by the original creditor, the holder thereof, to him, accompanied with the memorandum set out in the bill, setting forth the extent of the security intended to be given, with notice

thereof to the debtor, constituted a complete valid charge or lien in equity upon the fund in favor of the transferee ; just as an equitable deposit of title deeds, to secure a repayment of a sum of money, constitutes an equitable mortgage complete and indefeasible. * * The contention of the defendants, in *Woodham v. The Anglo Australian Assurance Co.*, was that the transactions stated in the bill constituted merely an assignment of a chose in action, so as to let in the application of *The Official Manager of The Athenæum Ass. Co. v. Pooley* (1 Giff. 102, 3 DeG. & J. 294), to affect the validity of the transaction in its reception between the original parties, and so to affect the title of the assignee. It is to this argument that Vice Chancellor Stuart addresses himself when he says, " This is not the case of the assignment of a chose in action at all. This is a demand against the company upon a deposit note which has been *assigned to nobody*, but which " (under the circumstances stated in the bill) " passed by delivery to the present plaintiff, who has a valid title " (to the extent of the equitable charge stated in the bill and sought to be enforced thereby). When he says, " A deposit note for money, like a deposit note for goods, passes by delivery of the instrument and requires no assignment," what he plainly means is, that a valid equitable charge or lien may be created upon instruments of this nature, and upon the fund or goods thereby represented by mere *delivery*, without any *assignment*, so as to remove all application of the doctrine of assignments of choses in action.

If it could be contended that deposit receipts were transferable in the sense contended for by Mr. Harrison, *that the holder is entitled to demand payment*, it could not have failed to be raised in *Pearce v. Creswick* (2 Hare 286, and 7 Jur.), where the principle, if sound, would have afforded a complete defence to the plaintiff's bill.

The pleas, however, in this case, if true, appear to me to shew circumstances which have absolved the defendants in equity from their original contract with, and liability to the plaintiff. A court of equity would never, in my opinion,

permit a plaintiff to assert a naked legal claim against persons who had *bonâ fide* paid the amount of the claim to persons to whom the original claimant had for good and valuable consideration transferred all his right, title, and interest in equity to receive and demand payment of the fund. This is what the pleas in substance assert, and they therefore, in my judgment, disclose a good defence upon equitable grounds.

But the question still remains whether or not the replications disclose facts which, if true, avoid the pleas upon equitable grounds. What the replications do disclose we must take to be true for the purposes of this enquiry. Now, to take the replication to the first equitable plea. The substance of the contention involved in this replication is, that the plea ought not to be admitted as a good defence upon equitable grounds, because, as the replication asserts, the plea is not true, in this, that the defendants did not *bonâ fide* pay the amount of the claim to a person or persons to whom the plaintiff had, for good consideration, transferred all his right, title, and interest in equity to receive and demand payment of the fund, but that he made the transfer to Shepherd & Co., under circumstances which, at best, gave them only an equitable charge upon the fund, the extent of which had to be determined by certain acts to be done by Shepherd & Co., and which they could only enforce by bill in equity; and the plaintiff alleges that Shepherd & Co., having taken no steps to ascertain the extent of the charge, he, the plaintiff, before the alleged transfer to Mann & Co., and before payment by the defendants, notified them that he disputed the validity of the equitable charge and gave the defendants notice not to recognize it or pay any of the fund in respect of it. Now, under these circumstances, what was the position of the defendants? They were, by their contract with the plaintiff, under a legal obligation to pay the plaintiff. He had created a valid equitable charge in favor of Shepherd & Co., which, having notified the defendants, may have made them responsible in equity to Shepherd &

Co. They could not, perhaps, have paid either without running the risk of being subject to a demand at the risk of the other. To protect themselves effectually from this double risk, the defendants could only file a bill in equity against the plaintiff and Shepherd & Co., calling upon them to establish their respective rights; but to obtain an injunction restraining the assertion by the plaintiff of his superior legal claim, they would, I apprehend, have been obliged to bring the fund into court. Instead of taking this course, the defendants have themselves elected to prefer the claim of parties having only an equitable charge to that of the person with whom they had entered into an express legal contract, and after they had received express notice from the plaintiff not to recognize Shepherd & Co's. alleged equitable charge, they have elected to disregard this notice and to pay the *whole* fund to the person having only an equitable charge *for an uncertain and unascertained* amount. By so doing they have exposed themselves, I think, to the legitimate consequences of the legal contract which they have entered into with the plaintiff. Taking, as we must upon this demurrer, the facts disclosed in the replication to be true, the way to look at the case, as it appears to me is, correcting the plea by the facts alleged in the replication, would a plea so corrected afford a good defence upon equitable grounds? and I think it would not, because a court of equity in such circumstances could alone administer the equities of the parties. The replication, therefore, does, as it appears to me, disclose facts which avoid the plea upon equitable grounds.

The replication to the second equitable plea rests precisely upon the same grounds as that to the first. I have not alluded to the point whether or not the agreement upon the part of Shepherd & Co. not to prosecute the plaintiff's son criminally for the alleged embezzlement, as stated in the replications, avoided the transfer in toto; for admitting that the transfer was not for that reason invalidated, the interest of Shepherd & Co., upon the facts disclosed in the replication, at best constituted only an

equitable charge, and this being admitted by the demurrers to the replications makes them, in my judgment, good, in avoidance of the pleas, upon equitable grounds.

Judgment for plaintiff on demurrer.

WOOLSEY V. FINCH.

Dower—Adultery.

It is the voluntary living apart in adultery that deprives a wife of dower, whether the leaving the husband's roof was *sua sponte*, or in consequence of his violence, or whether he abandoned her without provision.

DOWER.

Demandant claimed as widow of William Woolsey, deceased, and damages for detention from 1st April, 1869.

Pleas 1.—Ne nuques accouplè. 2nd. That demandant voluntarily left her husband and lived away from him to his death in adultery with David Pritchard, and was never reconciled to her husband.

Issue.

The trial took place at Simcoe before Wilson, J.

Evidence of the marriage, solemnized in Ireland, was given by two witnesses present, also of subsequent cohabitation.

It appeared that the parties then came to Canada and lived some time in the county of Lanark, and had two or three children: that they afterwards quarrelled and Woolsey left her, and she was heard to say her life was not safe with him, and that she would not live with or return to him.

In 1844, Woolsey went through the form of marriage with another woman in a different part of the country. Apparently after that, demandant went to live with Pritchard, and had ever since lived with him, and had children by him. It was said that a form of marriage was solemnized between them.

The learned judge told the jury that the evidence shewed a lawful marriage between demandant and Woolsey on the first issue, and that he thought the second plea not proved : that she had certainly committed adultery, but she had not voluntarily left her husband, he had abandoned her, and her adultery was subsequent to his.

Defendant objected to the charge on both issues.

There was a verdict for demandant and \$10 damages.

Anderson obtained a rule for a new trial without costs, for misdirection in holding there was evidence of the marriage, and that if the marriage was proved the evidence shewed a defence on the second plea.

J. A. Boyd shewed cause and cited *Graham v. Law*, 6 C. P. 310 ; *Woodward v. Dowse*, 10 C. B. N. S. 722 ; 2 Crabbe, 173 ; 1 Cruise Dig. 176.

Anderson, contra, cited *Woodward v. Dowse*, *supra*.

HAGARTY, C. J., delivered the judgment of the court.

The only point argued was on the second issue.

The view taken by the learned judge at the trial is supported by the case of *Graham v. Law* (6 C. P. 310). The plea there was framed like that before us. Draper, C. J., expressing some doubt, said, " The best opinion I can form is that, when the husband appears, as in this case, to have abandoned his wife and their children without making any provision for her or their support, that the Stat. 13 Ed. I., ch. 34, or of Westminster 2, does not bar her right to dower, though she has committed adultery.

This was in 1856. In 1861, the case of *Woodward v. Dowse* (10 C. B. N. S. 722) reviewed all the authorities, and Williams, Willes, Byles, and Keating, JJ., decided otherwise. There the plea stated that she voluntarily and without her husband's license or assent left him and lived in adultery and without subsequent reconciliation. *Replication*, that she was forced to leave by his cruelty, which rendered her cohabitation unsafe, and she was entitled to divorce *à mensâ et thoro*, and she was always

ready and willing to return to cohabitation with him but for his cruelty and his afterwards living in adultery with one H.

This replication was demurred to and judgment, after elaborate argument and review of the law, given against the demandant; in effect, that even if she had been compelled to leave from cruelty, and not *sud sponte*, her adultery was a bar.

Willes, J.: "Where a man so conducts himself towards his wife as to render it unsafe or unreasonable that she should be compelled to live with him, he sends her forth with authority to pledge his credit for necessaries; but still she is bound to conduct herself properly * * The question is whether, within the words and meaning of the statute, the plaintiff did consent and remain with the adulterer without being reconciled. If she has done that she has forfeited her dower. * * The best construction of the statute seems to be that the leaving *sponte* is not of the essence of the offence which leads to the forfeiture: it is enough if, having left her husband's house, the woman afterward commits adultery * *" He quotes Sir E. Coke, "For the cause of the bar of her dower is not the manner of her going away, but the remaining away with the adulterer in avowtry without reconciliation: this is the bar of the dower. * * Though she remains with the avowterer on any of the lands or manors of the husband, yet she shall be barred of her dower by this branch (*nisi vir sponte*, &c.) without the husband's free reconciliation; albeit it hath been otherwise holden; and the reason they yielded is, because it is no elopement, whereas it appeareth before that the words "*reliquerit et abierit*," are not of the substance of the bar of dower, but the adultery and the remaining with the adulterer, as is above said." "I think," he continues, "it is impossible more distinctly to lay down the law that if the wife leaves her husband's house from what cause, and commits adultery, the penalty imposed by the statute attaches."

I cannot see any distinction in the case where the

husband deserts his wife. His compelling her to leave by his violence, or her leaving in consequence thereof, or his abandoning her without provision, alike fail to warrant or excuse her subsequent voluntary living in adultery. The distinction between any of these cases would be too thin, in my judgment, to admit the application of a different rule of law to each.

I am satisfied that the case in this court would have been decided differently if *Woodward v. Douse* had then been in existence.

I think the rule must be absolute for a new trial without costs.

Rule absolute for new trial, without costs.

M'RAE V. ROBINS ET AL.

Division court—Unsettled account—Splitting cause of action—Prohibition.

Plaintiff, having been employed by defendants to purchase wool for them, on a commission to be paid him for so doing, sued them in the Division Court for this commission and for a sum of \$10 paid to an assistant. It appeared that defendants had furnished plaintiff with \$1100, and that plaintiff had expended \$36 beyond this sum in the purchase of the wool, but no question was made at the trial as to the due expenditure of the \$1100, the only question being whether plaintiff was entitled to any commission at all, and no claim was made for the \$36, or any portion of it, the plaintiff's demand being confined to the commission claimed on the quantity of wool purchased and not on the price paid: *Held*, not the case of an action for the balance of an unsettled account exceeding \$200, the balance of the unsettled account between the parties being \$36, which was not in question in this suit; and a prohibition was therefore refused.

Held, also, that there was no splitting of one cause of action into two, this being the case of a plaintiff having two separate causes of action, one for work and labour, and the other for the recovery of a balance due for money paid by him for goods in excess of the amount furnished to him for that purpose.

Palmer obtained a rule calling upon A. Macdonald, Esq., Judge of the County Court of the County of Wellington, and *ex officio* judge of the First Division Court of the said county, and the plaintiff to shew cause why a

writ of prohibition should not issue to prohibit the said Division Court from proceeding further on the plaint mentioned in the affidavits and papers filed on making the application.

From the affidavits it appeared that plaintiff was employed by defendants to purchase wool for them, and was to be paid a commission for so doing; in the course of his said employment he purchased 3734 lbs. of wool, for which he paid the sum of \$1136.50; that defendants had furnished him with cash to the extent of \$1100, and had, in answer to plaintiff's claim for commission, given notice of set-off for this sum of \$1100. From the statements furnished on affidavit of what took place at the trial, it did not appear that any question was made as to the due expenditure of this amount of \$1100, the question actually debated between the parties being whether plaintiff was entitled to any commission at all under a state of facts asserted by defendants and denied by plaintiff. An account, as appeared from the affidavit of one of the defendants, had been rendered by the plaintiff to them shewing the quantity of wool purchased and the price paid, which latter was in excess of the money received, by the sum of \$36.54, but no claim was made for this sum or for any portion of it, plaintiff confining his demand to the commission which he claimed on the quantity of wool purchased and not on the price paid.

Harrison, Q. C., shewed cause, citing C. S. U. C. ch. 19, sec. 59; *Grimbley v. Aykroyd*, 1 Ex. 479; *Kimpton v. Willie*, 9 C. B. 719; *Bonsev v. Woodworth*, 18 C. B. 325; *Re Judge of North. & Durham*, 19 C. P. 301; *In re Hall v. Curtain*, 28 U. C. 533; *In re Higginbotham v. Moore*, 21 U. C. 326.

Palmer, contra, cited *Story Agency*, secs. 203, 385; *Pullen Mercantile Accounts*; *Montague Sett-off*, 1; 1 Ch. Pl. 595; *Beswick v. Capper*, 7 C. B. 669; *Woodhams v. Newman*, 7 C. B. 654; *Kimpton v. Willie*, 1 L. M. & P. 280, 291, 292.

GALT, J., delivered the judgment of the court.

It was unnecessary for the plaintiff to enter into any discussion as to the amount received and disbursed by him, except in case the defendants had alleged that they had paid him a sum of money for which he had not accounted; that is to say, this was not a case of an action for the balance of an unsettled account in the whole exceeding \$200. The balance on that unsettled account was \$36.54, but formed no part of the claim before the division court, which was entirely unconnected with money, but was for work and labour, and for the sum of \$10 paid to an assistant, which was not entered in the account of the wool purchased, but was included in the present claim.

At the close of the plaintiff's case, Mr. Palmer, as set forth in his affidavit, "objected to the said judge that the said division court had no jurisdiction to entertain the said plaint, inasmuch as the plaintiff's demand was for a balance of an unsettled account exceeding two hundred dollars, the plaintiff having been obliged to prove the whole of his disbursements as above, and his claim arising out of one contract of agency constituting but one cause of action, and further, that the plaintiff was dividing a cause of action for the purpose of bringing the present plaint within the jurisdiction of the division court, inasmuch as the result of the above account of payments for wool shewed a balance of thirty-six dollars fifty-four cents in the plaintiff's favor and unsettled." The observations already made, in my opinion, answer the objection as to this being an action for the balance of an unsettled account. I think, also, that the objection as to the plaintiff having divided one cause of action into two must also fail. This was not a case of a single cause of action, but was one where the plaintiff had two separate and distinct causes of action, one for work and labour, and the other to recover the balance due to him for money paid for the wool in excess of the money furnished by the defendants. In *Wickham v. Lee* (12 Q. B 526), Erle, J., lays down the true rule as follows: "It is not a splitting of actions to bring distinct plaints where,

in a superior court, there would have been two counts." This would have been necessary in the present case, and consequently, I think, that this rule should be discharged.

Rule discharged.

APPLETON V. LEPPER.

False imprisonment—Justice of the Peace—Warrant—Jurisdiction—Separate damages—Admission of improper evidence—Excessive damages—Adding count.

Defendant, a Justice of the Peace, on the 5th May, 1869, issued his warrant against plaintiff on an alleged charge of stealing a lease, without any information being laid, upon which warrant plaintiff was arrested and brought before him:

Held, that defendant was liable in trespass, as without information on oath he had no jurisdiction over the person of plaintiff.

Defendant, on 11th May, caused plaintiff to be brought before him a second time on said warrant when there was no prosecutor, no examination of witnesses and no confession, and committed plaintiff for trial:

Held, following *Connors v. Darling*, 23 Vic. U. C. 541, that it was a new act of trespass for which a second count was well laid in the declaration.

At the Sessions defendant appeared as prosecutor, when plaintiff was tried and acquitted:

Held, that a count for malicious prosecution could be added for this.

Held, also, 1. That a warrant, though good on its face, will not protect a justice under cap. 126, C. S. U. C. sec. 2, unless issued upon a proper information.

2. That the jury may assess several damages on each count.

3. That the court will not grant a new trial for the improper admission of evidence where there clearly appears to be sufficient evidence to support the verdict independently of the evidence so admitted.

4. That \$1000 damages were not so excessive as to warrant a new trial. (See *Berry v. D'Acosta*, L. R. 1 C. P. 331.)

TRESPASS for assault and imprisonment on 5th May, 1869. Second count, the same on 11th May, 1869.

Third count, that defendant, on 5th May, maliciously, &c., issued a warrant under his hand and seal for apprehending and bringing plaintiff before him, or some other justice of the peace, to answer to a charge of stealing a lease, and defendant afterwards maliciously, &c., caused her to be arrested and caused her to be imprisoned six days, till he

maliciously; &c., caused her to be brought before him as a justice of the peace touching the charge, whereupon he, by another warrant, committed her for trial, when she was afterwards by the county judge admitted to bail to appear at general sessions; and defendant afterwards maliciously, &c., procured plaintiff to be indicted at the sessions for feloniously stealing a lease and piece of paper of one W. Mosley, and for feloniously receiving same, knowing them to be stolen; and defendant maliciously prosecuted the indictment against plaintiff until she at said sessions was tried and duly acquitted by a jury, &c., &c.

Fourth count, slander.

Fifth count, slander.

Plea, not guilty, by statute Consol. U. C. ch. 126, sec. 1 to 20.

The case was tried at Toronto before Galt, J.

It appeared that a summons, at the suit of Mosley, was issued by defendant, calling upon plaintiff to appear before defendant on a charge of trespass to property. It was dated 3rd May, 1869. She appeared same day and the matter was enquired into. A lease, made by plaintiff to Mosley, was produced, which the defendant afterwards, according to one account, took home with him, but according to another account he was talking to plaintiff after the trial, advising her to settle, when he said he would read the lease to her, and while he was getting his spectacles she snatched it up and took it away. Mosley swore that he produced the lease, and that it was his property.

A warrant, dated 5th May, was issued by defendant, stating that "information having been laid before the undersigned, &c., that L. A. Appleton did steal a lease between her and William Mosley, which was entrusted to my care, and being now made before —, substantiating the matter of such information, these are therefore to command you, &c., to apprehend the said L. A. Appleton and bring her before me, &c., &c., to answer to the said information." This warrant was under defendant's hand and seal.

A constable swore that defendant gave him the warrant ; that plaintiff was coming down the street and defendant pointed her out to him, and told him to arrest her ; that he did so, and afterwards brought her before defendant, who required her to give up the lease, which she refused to do, insisting it was her property. He said it was Mosley's, and he would commit her to jail if she did not. The constable then removed her by defendant's orders, and she was in his constructive custody some days, the constable requiring her to appear before him two or three times a day. On the 10th May defendant told him to bring her up, and she appeared before him. Defendant told her she was charged with stealing the lease, when she said it was her property. He said he would commit her unless she found bail. She refused, and next day he committed her to jail for trial. She was taken to Toronto and there bailed.

It was proved that defendant admitted there was no information laid, and that he himself was the prosecutor.

It was shewn that he did not wish to send her to jail, and tried himself and asked her friends to persuade her to give up the lease, and a brother magistrate said he admitted he did not think she had any felonious intention in taking it, that she took it as her own property, and that she was a girl of good character.

It would seem that defendant took the lease away to his own house after leaving the summons, and plaintiff was there and snatched it up and ran or went away with it, saying to defendant, as she went, " You shall never see this again." Defendant said to the persons present, " She has stolen the lease."

The indictment at the sessions was put in. Defendant's name was the first witness on it. A man named Devlin, who saw her take it in the store, and the constable were the other names indorsed. A true bill was found.

At the trial defendant was examined, and swore there was no information ; that he was prosecutor, and he did not believe she had stolen the lease, but took it as her own property. Plaintiff was acquitted.

For defendant it was objected, that on first and second counts trespass did not lie, as there was a warrant good on its face ; that malice was disproved, and no want of probable cause shewn.

Leave was reserved to move as to first and second counts.

The learned judge held there was evidence of want of probable cause, and the jury were so told ; that defendant was wrong in endeavouring to compel plaintiff to give up the lease, but that at the same time plaintiff's misconduct should weigh with them in considering damages. For defendant it was objected, that the learned judge should not have said that defendant ought to have applied to another justice of the peace, and not have acted in his own case, and should not have told them to find on each count, as plaintiff could not recover in case and trespass for the same act ; if defendant had jurisdiction it could only be in case ; if not, it could only be trespass, &c., &c.

The jury found for plaintiff on first count \$100, on second count \$100, on third count \$800, and on fourth and fifth counts for defendant.

In Michaelmas Term *McMichael* obtained a rule on the law and evidence, and for misdirection in ruling there was a want of probable cause, and that plaintiff might recover distinct damages on first, second, and third counts ; and in holding that there was evidence on first and second counts, when a warrant was shewn valid on its face, the issue of which was the subject of trespass ; and in ruling there were three distinct causes of action ; and for admission of improper evidence as to plaintiff's character ; and for excessive damages ; and because the verdict was inconsistent in treating the same act as both a direct and consequent wrong ; that the acts complained of in third count could only sustain a count in trespass and not a count in case, and if count limited to what happened at sessions, then the acts of trespass given in evidence and damages as for those acts under said count, and damages were thereby excessive and erroneous, &c., &c.

McKenzie, Q.C., shewed cause, and cited *Broad v. Ham*, 5 B. N. C. 722; *Arch. Pr.* 11th ed., 462; C. S. C. ch. 92, sec. 24; *Berry v. DaCosta*, L. R. 1 C. P. 331; *Smith v. Woodfine*, 1 C. B. N. S. 660.

McMichael, contra.

HAGARTY, C. J.—I have no doubt of the illegality of defendant's conduct. It is quite true that a warrant, valid on its face, was produced; but that warrant fails to protect the defendant, because it had no valid foundation. There was no information whatever laid before him; no complaint lodged either by Mosley or any other person: he had, therefore, no jurisdiction over plaintiff.

Assuming even that a crime had been committed, over which crime he, as a magistrate, might have jurisdiction; but, as was said in *Caudle v. Seymour* (1 Q. B. 892), his protection depends, not on jurisdiction over the subject matter, but jurisdiction over the individual arrested; and Coleridge, J., adds, "To give him jurisdiction over any particular case, it must be shewn that there was a proper charge upon oath in that case."

The defendant chose to act solely on his own view of the law. Because he sees the plaintiff snatch up a lease, in which she was the lessor, and say it was her property, he thinks fit to call it stealing, without any complaint or evidence on oath. After the plaintiff had gone away, and, judging from the dates, on a subsequent day, he issued the warrant.

Dr. McMichael contended that he had a right to act on his own view of a crime committed. Even if the law were so, he would have this further difficulty, that, according to his own repeated admissions, he did not himself believe that what he saw was a felonious taking; and it is not easy to see how any one could venture to pronounce the plaintiff's act, however otherwise improper, to amount to larceny.

In *Powell v. Williamson* (1 U. C. 155) a magistrate heard a complaint against the plaintiff, and then allowed

him to depart, directing him to appear next morning, and afterwards he sent a constable to arrest him, and he was taken to the station-house. The reason assigned for this was, that he was alleged to have assaulted the justice on the previous evening. Robinson, C. J., says: "If it were true that this plaintiff had assaulted the justice, the latter might, at the time of the assault, have ordered him into custody; but when the act was over and time had intervened, so that there was no present disturbance, then it became, like any other offence, a matter to be dealt with on a proper complaint made by defendant upon oath to some other justice, who might have issued his warrant. Neither a magistrate nor a constable is allowed to act officially in his own case except *flagrante delicto*, while there is otherwise danger of escape, or to suppress an actual disturbance and enforce the law, while it is in the act of being resisted."

There was no pretence here of any necessity for an interference of defendant as a magistrate, *flagrante delicto*, or to prevent escape, or suppress disturbance, &c., &c. The plaintiff was an old resident of the same village and well known to defendant. It would be a strange state of the law if a magistrate could legally interfere as defendant has done.

I think he was unquestionably a trespasser from the beginning. He did not even profess to have acted on view.

As the first taking was illegal, I think the first count supported in evidence.

When plaintiff was again brought before defendant on the 11th May, there was no prosecutor, no examination of witnesses, no confession under the statute; yet defendant committed plaintiff for trial.

Connors v. Darling (23 U. C. R. 541) is an express authority that even if there had been originally a good information, and proper warrant thereon to arrest, the commitment for trial, in the absence of any examination of witnesses, confession, &c., was an act of trespass without jurisdiction. The cases are reviewed there at some

length, and the law stated as existing for over three centuries, from the statute of Philip and Mary : " Before he shall commit or send such person to ward, he shall take the examination of such prisoner, or information of those that bring him."

I think this trespass could be given in evidence under the second count. As said by Lord Tenterden, in *Davis v. Capper* (10 B. & C. 28), " Every continuance of a party in custody is a new imprisonment and a new trespass." That was a case in which trespass was held to lie against the justice for remanding for an unreasonable time, on a warrant based on a valid information.

As to the third count for malicious prosecution, I am of opinion that it was not improperly separated from the rest of the case. In an ordinary charge laid before a magistrate, the person is arrested, examined, committed for trial, and acquitted. There, everything has been legal on its face ; but an action is brought against the original complainant for maliciously, &c., setting the law in motion, and the whole damages are enquired into, and all recoverable on one count properly framed. Here there is nothing of the kind. The defendant began and continued a series of independent wrongs. When he illegally committed plaintiff for trial, no one was bound to appear and prosecute. The plaintiff gave bail to appear to answer any charge at the sessions. The further prosecution, the preferring the bill, the production of the testimony, were the acts of defendant.

In a case like the present, where the facts were so peculiar, and the damages given separately on each count, we see no ground for interference arising from the state of the record.

As to the admission of improper evidence, we agree with the learned judge in rejecting evidence of character. The fact that the question of character was afterwards asked and answered ought not, I think, alone to warrant our interference.

Where it was in evidence that defendant more than

once himself bore testimony to her character as good, the fact of another person saying the same thing can have had but little, if any, weight with the jury : see on this *Rose v. Cuyler*.

I see no objection to the remarks made to the jury as to reasonable cause. It might be quite true that defendant had no personal malice or ill feeling. If his conduct were, as we consider it to have clearly been, wholly illegal, the consequences to plaintiff were just as serious as if his motives were of the worst character. On this head I refer to the remarks made by the court of Queen's Bench in *Connors v. Darling*.

Nothing remains for consideration except the question of damages.

They are unquestionably given on a very liberal scale ; and I think our opinion, individually, would incline strongly to a much smaller compensation. Any number of cases may be cited bearing on this question. All of modern date seem to tend to the views expressed by the court in *Berry v. DaCosta* (L. R. C. P. 331). Willes, J., says, "The court is called upon to exercise an exceedingly nice jurisdiction, and to interfere with that which is the peculiar and exclusive province of the jury, so long as they are not misled by prejudice or gross mistake, or misconduct themselves. I refer to *Smith v. Woodfine* (1 C. B. N. S. 660) * * The court lay it down that they will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent they have been actuated by undue motives." The court declined to interfere.

We have had this question many times before us, and its consideration generally is embarrassing.

We cannot impute wrong motives to this jury, nor that the amount awarded is so outrageously large as to be accounted for only on the belief of misconduct of the jurors.

I repeat that I regret the large compensation awarded and would prefer a much smaller amount.

The proceedings of the defendant were so singularly and almost unaccountably illegal, that I am not prepared to interfere with the finding of the jury.

GWYNNE, J.—I think it is clearly established that three separate and distinct torts, committed by the defendant, were proved, in respect of which the plaintiff was entitled to recover separate and distinct damages, and if it were not for the peculiar frame of the third count I should have no doubt that the damages have been assessed properly and should stand. As my learned brothers are convinced that in truth damages have not been given by the jury under one of the counts in respect of the same matter for which they have also given damages under another count, I do not dissent from their judgment. I can only say that I do not see the matter as clearly as they do.

Looking at the record of the verdict, I find \$100 damages awarded on the first count, \$100 on the second count, and \$800 on the third. Reading this third count as I do, it complains of a trespass and false imprisonment, charging it to have been committed maliciously upon the 5th May, continued for six days until the defendant again, in like manner, maliciously committed another trespass and false imprisonment under which the plaintiff suffered until she was bailed by the county judge, and then the count finally complains of a malicious prosecution by the defendant on an indictment for felony, whereon the plaintiff was tried and acquitted. Then, looking at the evidence, I find that the two trespasses in this count alleged to have been committed maliciously upon the fifth May, and again six days after, are the same identical trespasses complained of in the first and second counts, the only difference being that in the third count they are charged as having been committed maliciously, while in the others they are not. Under these circumstances I cannot say that I see clearly that the \$800 given on the third count *do not* comprehend the \$200 given on the first and second counts. As to setting aside the verdict for excessive damages, in other

respects, I do not see how we can possibly interfere without invading the legitimate province of the jury. The torts complained of were of a very grave and serious nature, the conduct of the defendant was wholly unaccountable and inexcusable, and although the damages may seem to be large, there is no pretence for attributing to the jury any improper motive, or for saying that they have assessed the damages upon any erroneous principle, and we are not at liberty to say that, in our opinion, they have visited too severely the violations of the law which were proved before them.

GALT, J., concurred with Hagarty, C. J.

Rule discharged.

CUSHMAN ET AL. V. REID.

Bills of exchange and promissory notes—Note payable in United States currency—Law Reform Act, 32 Vic ch. 6, sec. 17, Ontario—Verdict irregularly obtained set aside without costs.

Held, that a note made in the United States and payable in American currency is not an amount liquidated or ascertained by the signature of the defendant, so as to entitle the party suing upon it to avail himself of the provisions of 32 Vic. ch. 6, sec. 17, Ont.

Section 17 of the above Act enabled a plaintiff at any time after the Act came into operation to take down to the county court for trial the issues joined in any of the causes of action specified therein, whether the issues were joined before or after the Act came into force, provided only the provisions of sub-section 3 were duly observed.

In this case the verdict, though irregularly obtained, was set aside without costs, as defendant's attorney had not raised the objection upon which the verdict was set aside until after it had been obtained, and his conduct was wanting in candour in not drawing attention to such objections to the procedure as he intended to insist upon until the day before the trial, although he might have done so some two months before.

This was an action upon a promissory note, made at Chicago, in the State of Illinois, one of the United States of America, on the first day of March, 1867, whereby the defendant, jointly with two others and severally, promised to pay, twelve months after date, to Messrs. Cushman,

Hardin & Brother (the plaintiffs) or order, nine hundred dollars, value received, with interest at ten per cent.

The declaration was filed 3rd March, 1869, and therein plaintiff declared upon a promissory note simply for the above amount, not stating where note was made.

On 13th March, 1869, the defendant pleaded to this declaration *non fecit* and payment.

On the 20th March plaintiff joined issue, with notice thereunder in the terms prescribed in form A. of the Law Reform Act of 1868, signifying the plaintiffs' intention to try the issues at Belleville, in the county of Hastings (in which county the venue was laid) on 8th June then next. On 25th March issue book, with such notice therein, and also notice of trial for the sittings of the county court of the county of Hastings, 8th June, 1869, were served. Defendant's attorney did not return the issue book, nor at that time, nor for some time after, make any objection to the notice of trial, or to the plaintiff's right to take the case for trial at the county court sittings under the Law Reform Act. On 28th of April plaintiffs' attorney addressed and sent a letter to defendant's attorney, "proposing to take a verdict for such sum in Canadian currency as would be equivalent to the amount of principal and interest due on said note in United States currency or greenbacks."

On 3rd April defendant's attorneys replied, saying that they would communicate with their client and write again.

On 8th May they did write again as follows :

"DEAR SIRS,—We send memorandum in duplicate to Mr. Bell, to be also signed by you. In signing the admission we do not of course waive any rights our client may have in the premises."

The memorandum therein referred to was dated 8th May, 1869, was entitled in the cause, and signed by the respective attorneys of the plaintiffs and defendant, and was as follows: "It is mutually admitted by the undersigned, respective attorneys for said parties, that the instrument sued on in this cause was signed by the defendant, and that the amount thereof was payable in United States treasury

notes or funds, commonly termed "greenbacks," and that whatever, if anything, plaintiffs may be entitled to recover, the amount thereof shall be such sum in Canadian or British currency as will be equivalent to principal and interest in such notes or funds, called "greenbacks," allowing credit for the amount endorsed and paid on said instrument: this admission to be used as evidence by the said parties, saving all just exceptions to the admissibility of said instrument as evidence in this case."

Up to this time defendant's attorneys had made no objection to the proceeding proposed to be taken by plaintiffs' attorney under the Law Reform Act.

The first notice of objection to this proceeding, which the plaintiffs' attorney had, was a notice received by him through post on 7th June, the day before the opening of the sittings of the county court, whereat the trial was proposed to be had.

The notice was entitled in the cause, was signed by defendant's attorney and addressed to plaintiffs' attorney, and bore date, at Guelph, *May 4th*, 1869, and was as follows: "Take notice that the plaintiffs not having served an order for the trial of this cause at the county court of the county of Hastings, to be holden at Belleville on Tuesday 8th *June present*, defendant will move to set aside any verdict that may be entered in this cause, with costs."

This notice was enclosed in a letter from defendant's attorneys at Guelph, where he resided, addressed to plaintiffs' attorney at Belleville, where he resided, dated June 4th, 1869, as follows:

"DEAR SIRs,—

Reid v. Cushman et al.

"We find that you have served no order for the trial of this cause for the county court of the county of Hastings, and cannot of course proceed, as you will recollect the action was commenced before the present Law Reform Act came into effect. We do not wish to put you unnecessarily to costs or trouble, and will accept countermand of notice of trial sent to us by mail on Monday, if this does not reach sooner."

The plaintiff accordingly proceeded with the trial, and the cause came on for trial before the judge of the county court without a jury. To prove the issue, which the plaintiff had proved upon the plea of *non fecit*, he produced the memorandum set out, of 8th May, and thereupon evidence was produced of the value in currency of "greenbacks," as agreed upon in that memorandum, or the judge, proceeding upon his own knowledge of that value, assessed the plaintiff's damages at \$743.53, calculating the United States currency at gold quotation of 141. Whether this calculation was made upon the quotation of gold at the time of the trial, or at the time the note became due, does not appear.

Upon the 25th of June defendant obtained an order from Galt, J., in chambers, staying all proceedings on the verdict until the 5th day of Term, not upon the ground of the objection that the Law Reform Act did not apply to the case of an action commenced before it came into effect, which was the ground of objection contained in the notice received by plaintiff's attorney from the defendant's attorney upon 7th June, but upon the ground that, of which opinion the learned judge was, the amount for which the action was brought was not, under the circumstances, "liquidated or ascertained by the signature of defendant" within the meaning of the 17th sec. of the Act. The learned judge's judgment, when making the order, is reported in 5 Prac. Rep. 121.

J. Read accordingly obtained a rule to set aside issue book, notice of trial and verdict, for irregularity, with costs, upon the above ground.

Fleming shewed cause, citing *Hooker v. Leslie*, 27 U. C. 295; *Wallbridge v. Brown*, 18 U. C. 158.

Read, contra, cited *White v. Baker*, 15 C. P. 292; *Green v. Lewis*, 26 U. C. 618; *Massachusetts Hospital v. Provincial Insurance Company*, 25 U. C. 613; *Stephens v. Berry*, 15 C. P. 548.

GWYNNE, J., delivered the judgment of the court.

From his letter it would seem that the only objection which the defendant's attorney *then* had to the trial being proceeded with under the provisions of the Law Reform Act was that, as he contended, that Act did not apply to this case, for the reason that the action was commenced before the passing of the Act. If this were the point upon which the defendant sought to set aside the verdict we apprehend that he must fail; for, although the writ of summons issued upon the 5th of January, and the Act came into effect on the 1st of February, yet the declaration was filed and issue was joined after the Act came into effect, and the 17th sec. provides that "all issues of fact and assessment of damages in the superior courts of common law relating to debt, covenant and contract, where the amount is liquidated or ascertained by the signature of the defendant, may be tried and assessed in the county court of the county where the venue is laid, if the plaintiff desires it, unless a judge of such superior court shall otherwise order." &c., &c.

This section, we have no doubt, enables a plaintiff at any time after the Act shall come into operation to take down to the county court for trial the issues joined in any of the specified causes of action, where the amount is ascertained as in the section mentioned, whether the issues were joined before or after the Act came into effect, provided only that notice of trial should be served, and the issue be delivered as prescribed by the 3rd sub-section of the 17th section.

We are all of opinion that the judgment of the learned judge, delivered in chambers, upon the granting of the order, is right, and that, inasmuch as it appeared that the amount for which the defendant ever was liable under the note, was not \$900, that is, of Canadian money, but such amount in Canadian money as, having regard to the difference between the value of United States treasury notes and Canadian currency, the \$900 expressed in the note, with interest, should be worth, which value is con-

stantly varying, an element of uncertainty was introduced which renders it impossible for us to say that the amount sued for, and for which the defendant was liable, was ever "liquidated or ascertained by the signature of the defendant." If so ascertained it must have been when defendant affixed his signature to the instrument; but it is obvious that at that time it was not only not ascertained, but it was unascertainable what should be the amount payable and due under the instrument twelve months afterwards.

It was contended for the plaintiff that *Wallbridge v. Brown* (18 U.C. 158) was decisive in favor of the plaintiff's view, but we think not. There it was decided that where the defendant had agreed in writing to pay to the plaintiff the invoice price of a lathe, and the charges of freight and duty, reference could be had to the *certain* price *named in the invoice*, and to the *fixed* charges for freight and duty *paid* by the plaintiff, for the purpose of determining that the amount claimed by the plaintiff was sufficiently liquidated and ascertained by the act of the parties, within the amount for which an action could be brought in the county court, so as to give that court jurisdiction to try the case; but here there is nothing certain, or "ascertained by the signature of the defendant," (which are the words of the Act,) by which the amount demandable can be determined, for with the varying quotations of the value of United States funds or greenbacks, as compared with Canada currency, the defendant can have nothing to do, and evidence must be called for that purpose, which evidence may shew very great variations not only from one day to another, but at different times of the same day, and we do not think that the Law Reform Act contemplated removing from the superior court for trial in an inferior court, at the will of the plaintiff alone, a cause of action where the *whole* principal amount demanded by the plaintiff in the action was not clearly "ascertained by the signature of the defendant." The statute 28 Vic. ch. 42 must still be resorted to if the *whole* principal amount is not so ascertained. The cases which we think are more applicable to the

determination of this case than *Wallbridge v. Brown*, are *Palmer v. Fanestock* (9 C. P. 172); *Wood v. Young* (14 C. P. 250); *Grant v. Young* (23 U. C. 387).

In *Palmer v. Fanestock*, an instrument, purporting to be a promissory note, with the words, "with exchange on New York," was held not to be a promissory note, the amount being rendered uncertain by the uncertainty of the exchange. In *Wood v. Young*, and *Grant v. Young*, it was held that an instrument, dated at New York, signed and endorsed by defendant, promising "to pay to the order of myself \$1040.23, at the Bank of Upper Canada, in Toronto, with the current rate of exchange on New York," though not a promissory note, was an instrument containing two promises, the one being the account stated of the amount named in the instrument, which was ascertained, and the other to pay also, in addition, the rate of exchange on New York, which was not ascertained.

Now the case here is stronger, for it being admitted that the defendant was never liable under the instrument for the whole \$900 named in the instrument, that is, in Canada funds, but only so much thereof as at a future time would, in Canada funds, be equivalent to \$900 in United States treasury notes, there cannot be said to have ever been an account stated between the plaintiffs and defendant here to any specific sum in Canada funds. We would gladly support the verdict if we could, for we feel that the defendant has suffered no prejudice, but, on the contrary, by the objection has obtained a considerable advantage in postponing the time of plaintiffs' recovery; but we feel constrained to yield to the objection. We do not, however, think that we are rigidly bound to adhere to the ordinary rule that irregularities in procedure are usually set aside with costs, for from the defendant's attorney's conduct we are satisfied that he never made the objection, which he now rests upon, until after the verdict was obtained, and we do not think that his conduct was marked with candor in not drawing the plaintiffs' attorneys' notice to such objections to the procedure as he had or intended to

insist upon until the day before the opening of the court at which the trial was to be had, although the issue-book and notice of trial had been served more than two months previously, and the admission, which he must have known was intended to be used at the intended trial, of which notice had been given, was made just one month before the trial. We think that we extend to the defendant his full measure of justice by making the rule absolute to set aside the verdict, but without costs.

Rule absolute to set aside verdict, without costs.

IN THE MATTER OF THE QUEEN V. ALBERT J. GOULD.

Extradition—Forgery—Evidence—Case presenting several views.

In cases arising under the Extradition Treaty, if the evidence present several views, on any one of which there may be a conviction, if adopted by the jury, the court will not discharge the prisoner, but will direct extradition.

Held, also, that the execution of a deed by prisoner in the name of and representing himself to be another, may be forgery, if done with intent to defraud, even though he had a power of attorney from such person, but fraudulently concealing the fact of his being only such attorney, and assuming to be the principal.

THE prisoner was brought up on *habeas corpus*, on an application to discharge him, having been committed for extradition by the judge of the County Court of the County of York, on a charge of having feloniously forged a certain deed of assignment of a patent right, purporting to be signed, made, and executed by one Phineas Strong, of the City of New York, in the State of New York, with intent to defraud.

The evidence and depositions, having been produced before the court under a writ of *certiorari* issued for the purpose, disclosed the following facts :

The prisoner, representing himself to one John M. Tower to be Phineas Strong, of the City of New York,

the owner of a certain invention called the Gang Plough, patented in the United States by the inventor, one Perry, on the 7th July, 1869, executed a deed *as* and in the name of Phineas Strong, as such owner of such patented invention, in consideration of \$1000 to him in hand paid by Tower, the receipt whereof was thereby acknowledged, purporting to convey to Tower the right to use, manufacture, and vend the said patented invention in the towns of Wilson and Newferne, in the County of Niagara, in the State of New York. This deed contained a covenant purporting to be made and entered into by and under the hand and seal of Phineas Strong, as follows, "For value received I hereby agree with John M. Tower, that in case he, after using due diligence, shall fail to sell the territory or gang plough, described above, for \$2000, within three months from date, I will purchase the same of him at the same price, by his dividing the profits on what he has sold, or will give him more time to sell." It further appeared that the prisoner's name was Albert J. Gould, by which name he had always been known, and that after diligent search no such person as Phineas Strong could be found or heard of as residing in the City of New York. The prosecutor Tower also swore that he never would have dealt with the prisoner in respect of the transaction, if he had not believed the representation made to him by prisoner, namely, that he was the very Phineas Strong which he represented himself to be and the owner of the patented invention.

Such was the case made by the prosecution and which it was contended was sufficient to hold the prisoner for extradition.

Upon behalf of the prisoner it was contended that the *primâ facie* evidence was contradicted and, in fact, displaced by evidence offered by the prisoner, and which consisted in this, that the prisoner produced and proved, 1st. A power of attorney, dated 11th May, 1869, executed by Perry, the patentee, authorizing Albert J. Gould, as Perry's attorney irrevocably, for him and in his name, place, and

stead, to sell the patent right throughout the States of New York, Pennsylvania, Iowa, and Minesota, upon such terms as the said attorney might think best, and to make, sign, execute, and deliver any and all papers necessary for the vesting of such title in the purchaser or purchasers thereof.

2. An instrument, bearing same date, under the hands and seals of Perry and Gould, whereby Gould covenanted to pay to Perry for every one of the above named States, in which he should sell such patent right, whether the whole of each State is sold, (*a*) or any part thereof, the sum of one thousand dollars for the State of New York, and other sums for the other States, such sums to be paid within six months after the first sale made for any portion of each of such States, and it was provided that the said power of attorney should remain irrevocable *only so long as and no longer than* the said Gould should comply with the terms of the agreement.

3. A deed, purporting to be executed by Perry, dated 2nd June, whereby Perry, in consideration of \$5000, therein expressed to be paid to him by Phineas Strong, of the City of New York, in the State of New York, the receipt whereof, &c., purported to convey to said Strong the right to use, manufacture and vend said invention for the State of New York. The name of Perry set to this deed was proved to be in the handwriting of Gould, but the deed did not purport to be executed by attorney. By a certificate, purporting to be that of the commissioner of patents of the United States, under his official seal, endorsed on this deed, it was certified to have been received for record in the United States Patent Office on 6th July, 1869, and to be there recorded. This deed was produced from the possession of the prisoner. The seal and signature of the commissioner of patents to the certificate were proved. This deed purported to have been executed in the presence of one Charles H. Gould, but neither he nor any other witness was called to prove the

fact of or the manner or time of the execution of the deed further than it was proved that the name of Perry, who purported to execute it, was signed by Gould.

4. A deed, purporting to be a power of attorney, executed by Phineas Strong to Gould, bearing no date, but purporting to be acknowledged before one A. Cowdin, a justice of the peace of the County of Genessee, in the State of New York, on 7th June, 1869, and to appoint Gould as his (Strong's) attorney irrevocable, for Strong and in his name, place, and stead, to sell the patent right throughout the State of New York.

Cowden was called by the prisoner as to the execution of the power of attorney, and stated that he had known Phineas Strong, of Pembroke, Genessee County, for thirty years; that he had never resided elsewhere to witness's knowledge; that he (witness) was a justice of the peace; that Strong and Gould came to his office on 7th of June; that Gould produced this and another document; that witness said to Strong, "Do you acknowledge the execution of these papers," and he said that he did, and witness then certified them; that the papers were neither of them read to Strong, nor did he see Strong sign them; that witness's impression was that they had been filled and signed before they came to his office.

His evidence having been given upon behalf of the prisoner, Phineas Strong, of Pembroke, was called upon behalf of the prosecution.

This evidence in substance was, that he had never been in the City of New York in his life; that he never purchased the patent right mentioned from Perry or from Gould; that he never purchased any patent right in his life; that he knew nothing of Perry; that Gould never offered to sell him any patent right, nor ever spoke to him about his (Strong's) receiving or obtaining from him or through him any interest in any patent right; that he never paid Gould or Perry anything on that or any account; that Gould never spoke to him of any power of attorney; that he never set his seal to the power of attorney produced,

or executed any such instrument, or delivered it as his act and deed; that in fact Gould procured him to sign his name to some papers which he never read or heard read, telling him he was witnessing some deeds which he Gould was sending to Washington; that these were the papers referred to by Cowdin; that Gould took him for the sole purpose of witnessing them; that Gould took them out of his pocket and he set his name, believing he was signing as a witness only, and as such he acknowledged them, as he understood, before Cowdin; that he positively never set a seal to any of the instruments; and, as to the power of attorney, it being produced to him, that it was not his deed; that he was not the Phineas Strong mentioned in the deed, that is, that the description as of New York was wholly inapplicable to him; his evidence in effect being, that Gould fraudulently and by false pretences procured him to set his name to these instruments, in total ignorance of their contents and believing he was signing as a witness, and that the documents so subscribed by him had no seals whatever to them when he signed.

The power of attorney, on inspection, shewed that the seal appearing on it was affixed to it after Strong's name was signed, being plainly placed over part of his signature.

McKenzie, Q. C., and *Scott* shewed cause, citing *Rex v. Whiley*, Russ. and Ry. 90; *Rex v. Peacock*, *Ib.* 278; *Rex v. Francis*, *Ib.* 209; *Rex v. Dunn*, Leach C. C. 57; *Rex v. Bolland*, *Ib.* 83; *Rex v. Hampton*, 1 Moo. C. C. 255; *Rex v. Hill*, 2 Moo. C. C. 30; *Rex v. Parks and Brown*, 2 Leach C. C. 775; *Regina v. Collins*, 2 M. & Rob. 461; *Regina v. Chadwick*, *Ib.* 545; *Shepherd's Case*, 2 Leach. C. C. 101; *Rex v. Taft*, 1 Leach. C. C. 172; *Ann Lewis*, Foster's C. C. 116; *Regina v. Hinley*, 2 M. & R. 524; *Rex v. King*, 5 C. & P. 123; *Rex v. Goate*, 1 Lrd. Ray. 737: Com. Dig. "Pais" (D); *Pigot's Case*, 11 Co. 47.

McMichael, contra, cited *Hervey's Case*, 1 Leach. 229; *Rex v. Webb*, R. & R. 405; *Clark's Law of Extradition*, 105.

GWYNNE, J.—It cannot be denied that the evidence for the prosecution presents a sufficient *primâ facie* case to go to a jury, and, if uncontradicted, to convict the prisoner, if the jury should be satisfied there was an intent to defraud; and it is sufficient for the present purpose to say that, inasmuch as a *primâ facie* case was made out, sufficient to warrant the commitment of the prisoner to stand his trial upon the charge, a jury is the only constitutional tribunal which can determine whether the evidence offered to displace the impression which the *primâ facie* case is calculated to make, does or not satisfactorily displace it. If the jury should adopt the testimony of Phineas Strong, and should be of opinion that a seal was falsely and fraudulently set by Gould to the instrument produced as the power of attorney of Phineas Strong, after Strong had signed his name, as he says, under the belief that he was subscribing some document at Gould's request, as a witness only, they may come to the conclusion that the power of attorney is itself a forged instrument, and, if it be, they may, perhaps, as a consequence, arrive at the conclusion that the deed, which is impeached, is a false instrument, executed with intent to defraud, notwithstanding that it is stated in evidence to be sufficient for a person having a power of attorney, according to the law of the United States, to execute such a deed as that which is impeached, in the name of his principal, suppressing at the time the fact of his having a power of attorney; and even though a jury may be unable to come to the conclusion that the seal was so set to the instrument, and so should be unable to find that the power of attorney is itself a false and forged document, yet it may be that they should be of opinion that the facts would warrant their finding that its execution, and the execution of the deed produced by the prisoner, purporting to be from Perry to Strong, were effected under circumstances of falsehood, and in a manner so false and fraudulent as to vitiate them wholly and deprive them of all vitality, so as to prevent their being of any force when now brought forward for the purpose of

divesting the prisoner's conduct of that character of criminality which the *primâ facie* evidence offered naturally attaches to his conduct in suppressing the alleged authority, when he was executing, in an assumed name and person, the deed which is now impeached. Moreover, I am not prepared to say that it is clear beyond all question that, assuming the power of attorney to have been *bonâ fide* executed by Phineas Strong, the act of the prisoner's suppressing it, and of his assuming the person and name of Strong to effect his purpose with the prosecutor, which otherwise he might have been unable to effect, and of his executing, as Strong and in his name, a deed containing a covenant apparently not warranted by the power, may not be forgery. In short, I am not prepared to say that in no view of the evidence taken can the execution of the impeached deed constitute forgery. If the offence charged had been committed in this country, I do not think that the case would be ripe for us to pronounce a judgment whether the forgery, which is charged, had been committed or not, until a jury should pass upon the evidence, and I do not think we can be called upon to do so upon an application of this nature. I think that the learned judge of the county court has formed a correct judgment in holding that the evidence is such as to require the intervention of a jury to eliminate the facts, and we would not be justified in withholding the evidence from the constitutional tribunal. This would be the effect of our judgment if we should order the prisoner to be discharged. The proper course, in my judgment, is to leave the prisoner to abide the legal consequences of the commitment of the learned judge who has taken the evidence.

HAGARTY, C. J.—I am to dispose of this case on this principle. On the evidence laid before the judge below, was there enough, in the words of the Act, "to justify the apprehension and committal for trial of the person accused, if the crime, of which he shall be so accused, had been committed herein," viz., in this Province.

I do not consider that we are called upon, in a case presenting several views, to determine which of these views is best supported, as against the others, by the weight of evidence or intrinsic probabilities of the case.

If there be a view of the case which, when properly submitted to a jury, would, if adopted by them, warrant their convicting, I think it quite sufficient.

The learned judge below has passed his judgment on the matter, and has decided against the prisoner. I must be fully satisfied that there is no legal ground on which such decision can be supported before I practically reverse his decision.

It is sworn by Towers that the prisoner always represented himself to be Phineas Strong, and that he dealt with him solely as such person and not as agent for him or any one else.

This may have been done in bad faith by the prisoner, fraudulently concealing the fact that he was only the attorney of the other, or it may have been a mere error or an unintentional misconception.

At the foot of the deed to Towers we find a short memorandum under seal, by which Phineas Strong is made to agree that in a certain event he would repurchase the patent right from Towers for a large sum of money, on dividing the profits made in the meantime between them.

Had he announced himself as Strong's attorney and shewn his authority, it would have been disclosed at once that he had no power to make any such special contract.

This would be a most important element in the consideration, whether he fraudulently represented himself to be the principal and not the agent.

It is not denied that the fraudulent personation of another person, and the execution of a deed in his name and as his deed, is forgery.

I am not prepared to hold that this is not sufficient ground for committing him for trial in this view of the

evidence, or that at the trial it would not be proper to submit such a view to the jury.

It is to be observed that Phineas Strong swears that he never knowingly executed any deed or power of attorney whatever : that all he understood he was doing was attaching his name as witness to some papers, and that he never sealed them. The seal appears partly over his name. This, of course, may have been done quite properly, the seal being put on after he had written his name, and he then may have delivered it as his deed. This is not the forgery charged ; but all the dealing with Strong was, according to Strong's account, fraudulent, and the whole conduct of the prisoner, first, in the dealing with Strong, and afterwards with Tower, would be considered indicating the question in the eye of the law whether he is guilty or not guilty of the forgery charged.

In re Windsor (6 B. & S. 527) Cockburn, J., says : " We must take the term "forgery," in the Extradition Act, to mean that which by universal acceptance it is understood to mean, namely, the making or altering a writing so as to make the writing or alteration purport to be the act of some other person, which it is not."

There is a case of *Regina v. Ritson* (L. R. C. C. R. 200). A father made a deed to his son, antedating it for a fraudulent purpose. The court, on a case reserved, held that they were properly convicted, " as it is a forgery to fraudulently make a deed which purports to be something quite different from that which it really is, even although it is executed by the parties between whom it is expressed to be made."

It is no part of my duty to decide on the weight of evidence, or of the possibly favourable view a jury may take of the prisoner's conduct.

I find a decision of the judge before whom the complaint was investigated ; I find one view of the evidence adduced on which that decision may be upheld ; and whatever opinion I might hold of the existence of other views, at least, as open to adoption, I do not think I am called on to interfere.

I have already expressed my opinion in this court of the spirit which in my judgment should govern the execution of the Extradition Treaty. I have neither the right nor the desire to put my opinion of the weight or the cogency of the evidence in the place of that of the jury who may be selected to try the prisoner.

I think the prisoner must be remanded.

GALT, J., concurred.

Prisoner remanded.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—CHARLES EDWARD BLAKE ANDERSON, JOSEPH REGAN, HORACE LAPIERRE, GEORGE CHRISTIE GIBBONS, JAMES THOMAS GARROW, WILLIAM FITZGERALD, WALTER DUDLEY, WILLIAM GEORGE HANNAH, JOHN KING, WILLIAM DAVIDSON, GEORGE KERR, HUGH JAMES WOODSIDE, CHARLES MOSS, SAMUEL BARTON BURDETT, JOHN RUTHRVEN WILSON.

Regula Generalis.

In the Courts of Queen's Bench and Common Pleas.

MICHAELMAS TERM, 33 VICTORIA.

Thursday, the second day of December, A.D., 1869.

It is ordered that the first Wednesday in Hilary Term, in the Court of Queen's Bench, and the first Thursday in the said Term, in the Court of Common Pleas, shall be New Trial Paper Days.

(Signed) JOHN H. HAGARTY, C. J. C. P.

“ JOS. C. MORRISON, J.

“ ADAM WILSON, J.

“ JOHN W. GWYNNE, J.

“ THOMAS GALT, J.

HILARY TERM, 33 VICTORIA, 1869.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

IN RE BRIDGET DONELLY.

By-law—Conviction for using blasphemous language—No statement of words used—Jurisdiction—Evidence.

A conviction by a magistrate stated that defendant did on, &c., at &c., being a public highway, use blasphemous language contrary to a certain by-law, which was passed almost in the words of C.S. U. C. ch. 54, sec. 282, sub-sec. 4, but there was no statement of the words used : *Held*, bad.

Semble, also, that there was nothing in the evidence set out below giving the magistrate jurisdiction to act.

In Michaelmas Term last *McCarthy* obtained a rule to quash a conviction, a *certiorari* to bring up all papers connected therewith having been previously returned, on the ground that there was no jurisdiction, no offence shewn, no statement of the words used, &c., &c.

The conviction set out that Bridget Donelly did on, &c., at ———, being a public highway in the County of Simcoe, use blasphemous language contrary to a certain by-law of the corporation of the County of Simcoe, passed 18th October, 1860, entitled, &c., and adjudging her to pay one dollar, &c., and costs to William Atkinson, the complainant, \$4.20 for his costs, &c., awarding distress and imprisonment for ten days in default.

The 7th clause of the by-law was as follows : “It shall not be lawful for any person to utter or use any profane

oath, or any obscene, indecent, blasphemous, or grossly insulting language in any of the streets or public places or highways within this county."

This was passed under sec. 282, sub-sec. 4 of ch. 54, U. C. Consol. Stat., almost in the same words.

Harrison, Q. C., shewed cause. He cited *Rex v. Liston*, 5 T. R. 338, 341; *Reg. v. Justices of Cheshire*, 8 A. & E. 398; *Rex v. Justices of Westminster*, 2 A. & E. 241; *Hespeler & Shaw*, 16 U. C. 104; *Reg. v. Bolton*, 1 Q. B. 66; *In re Clark*, 2 Q. B. 619; *Reg. v. Justices of Buckinghamshire*, 3 Q. B. 806; *Hopkins v. Mayor of Swansea*, 4 M. & W. 621; *King v. Speed*, 1 Lord Ray. 583; *Davis v. Nest*, 6 C. & P. 167; *Re Perham*, 5 H. & N. 30; *Reg. v. Nott*, 4 Q. B. 768; *Reg. v. Scott*, 4 B. & S. 368; 29 & 30 Vic. ch. 50, sec. 1.

McCarthy, contra, cited *Paley on Convictions*, 433; *Bailey's Case*, 3 E. & B. 607; *Rex v. Sparling*, 1 Str. 497; *Rex v. Neild*, 6 Ea. 417; *Rex v. Pappineau*, 2 Str. 686; *Rex v. Hazell*, 13 Ea. 141.

HAGARTY, C. J., delivered the judgment of the court.

This conviction and the papers returned to us as the foundation of it present a very singular instance of the application of this statute and the by-law passed thereunder. The objections urged are of the most substantial character.

The first to be considered is the omission of any statement of the words used to constitute the offence.

It is said in *Paley on Convictions* (1866), page 210, "Another rule in describing the offence is, that it is not sufficient to state, as the offence, that which is only the legal result of certain facts; but the facts themselves must be specified, so that the court may judge whether they amount in law to the offence," citing *Reg. v. Nott*, 4 Q. B. 768, 783. Again: "It may be collected, as a general rule, that, where an act in describing the offence makes use of general terms which embrace a variety of circumstances,

it is not enough to follow in a conviction the words of the statute, but it is necessary to state what particular fact prohibited has been committed."

A case of *Reg. v. James*, Cald. 458, is there cited, but I have not been able to see it in the book cited. Buller, J., "It is not true that in framing a conviction it is sufficient to follow the words of the statute in all cases. In some, indeed, it may, as where the statute gives a particular description of the offence; but it is otherwise where a particular offence is included under a general description. Where a particular act constitutes the offence, it may be enough to describe it in the words of the Legislature; but where the Legislature speaks in general terms, the conviction must state what act in particular was done by the party offending to enable him to meet the charge."

Some of the older cases cited by *Paley* are expressly in point. In *Rex v. Sparling* (1 Str. 497) a conviction for profane swearing was quashed, because the oaths were not set out; "for what is a profane oath or curse is matter of law and ought not to be left to the judgment of the witness * * Suppose it was for seditious or blasphemous words, must not the words themselves be set out, be they ever so bad, that the court may judge whether they are seditious or blasphemous?"

Regina v. Scott (4 B. & Sm. 368), was a conviction for "profanely cursing one profane curse in these words (setting them out) twenty several times repeated," and he was fined £2, apparently 1s. for each oath. The sole question was as to the right to include all the curses in one conviction. Wightman, J., says, "The curse is set out, which without doubt is profane." In *Lloyd's* case (2 Ea. P. C. 1122) it was held that an indictment for sending a threatening letter should set out the letter.

Regina v. Nott (4 Q. B. 768) was an indictment against a magistrate for administering "an oath touching certain matters and things, whereof the said J. N., at the time and on the occasion last aforesaid had not any jurisdiction or cognizance by any statute in force, &c. The

statute 5 & 6 Wm. IV., ch. 62, sec. 13, prohibits the administering by any justice of the peace, or other person, of any oath "touching any matter or thing whereof such justice, &c., hath not jurisdiction, &c., by some statute in force at the time being." The indictment was held bad. Lord Denman says, "It is quite clear the having or not having jurisdiction is matter of law depending upon facts on which the court is to form its opinion. The facts therefore should be so stated as to enable the court to form its opinion." Patteson, J., "There is not anything to shew what the matter of the oath was. It never can be a question for a jury whether a particular oath was or was not within a given jurisdiction."

Assuming it to be generally correct to state that it is sufficient in a conviction to follow the words of the statute creating the offence, we have to see if this conviction can be supported.

The applicant is convicted for using blasphemous language on a public highway.

The commission of the offence, defined as "using blasphemous language," is (in the words already quoted) only "the legal result of certain facts."

When a statute makes it penal to "commit any wilful and malicious mischief," it must be impossible, I think, to uphold a conviction which merely stated that a man was convicted of doing a certain wilful and malicious mischief," without a statement of the facts constituting the offence.

It would not suffice to say that a man committed champerty, or maintenance, or sedition, &c., &c.

In re Perham (5 H. & N. 30) the conviction was for unlawfully, by threats, endeavouring to force one W. J., a workman, to depart from his hiring. It was objected that the threats were not set out. The conviction was upheld. Channel, B., (at p. 32) says, "The offence is not the threat, but the forcing or endeavouring to force the workman to depart from his employment: the threats are the means by which that is done." Pollock, C. B., (at p. 34) "To whom the threats were addressed, and whether they were of a description to

act upon the mind of the party threatened, so as to create the offence charged, is all matter of evidence."

I think the conviction is bad on its face.

It has also been objected that there was nothing in the evidence to give the magistrate jurisdiction to act.

The information states that B. D. has been guilty of circulating and (*sic*) blasphemous and grossly insulting language in several public places and highways within the township of Tecumseh, by saying and swearing that the said W. A. defrauded her, by giving her two five dollar bills instead of two tens.

I think it was a most absurd act of the magistrate to proceed against the woman on such a charge.

When the complainant was examined at the hearing he merely swore that Donelly, having spun some yarn for him, she refused to take silver for it, and he then gave her a \$10 bill and took back six at her request, and changed another \$10, and got small bills for the same.

Another witness swears he was present when the above took place, as to the money, but deposes nothing as to the woman's language.

The magistrate writes on the depositions that, plaintiff and defendant being present, the charge being read and defendant asked what "she had to say in the matter, the defendant acknowledged and still says plaintiff defrauded her, and now in open court and before me the justice makes use of blasphemous and grossly insulting language, by saying that both plaintiff and his witness has sworn false and is perjured."

If it were necessary to decide this part of the case, I should say that the papers returned to us on the *certiorari* disclose no offence to warrant the conviction. The whole charge is, in fact, that she said and swore that Atkinson defrauded her by giving her two \$5 bills instead of two \$10.

Nothing whatever appears to shew that she swore in any way that can be called a profane oath, or that any person was present except the complainant, or that the

charge of defrauding him was made in any loud or violent manner, &c.

If a person can be convicted on such testimony as this, it must of course follow that simply to say to a person on a public road that he had defrauded the speaker in some matter is *per se* an offence under this by-law.

As to our looking behind the conviction, to see if there were any evidence to warrant it or to give jurisdiction to the magistrate, I refer to *In re Bailey* (3 E. & B. 618), and *Regina v. Bolton* (1 Q. B. 72). The weight of the evidence is left to the magistrate, but if there be no evidence whatever, it seems that the conviction cannot be upheld.

The distinction is clearly pointed out by Lord Campbell in the first cited case.

We cannot refrain from expressing our regret that any person's liberty should have been interfered with on such absurd grounds, or that the administration of justice should be entrusted to persons who, however possibly in other respects respectable, are capable of inflicting such serious injury in the abused name of the law.

Rule absolute to quash conviction.

SHAW V. PHOENIX INSURANCE COMPANY.

Glebe lands—Lease by Rector—Covenant for renewal—Continuance in possession after lessor's death—Insurable interest.

A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant.

THIS was a special case for the opinion of the court, the facts of which are so fully stated in the judgments that it becomes unnecessary to repeat them.

The case was originally argued in Easter term last, and was re-argued in the following Michaelmas term.

J. A. Boyd, for the plaintiff, cited *Stevenson v. London and Lancashire Assurance Co.*, 26 U. C. R. 148; *Phillips on Insurance*, 4th ed., I., ss. 196, 195, 196; *Joyce v. Swann*, 17 C. B. N. S. 314; *Lyster v. Kirkpatrick*, 26 U. C. R. 217.

G. Kirkpatrick, contra, cited *Seagrave v. Union Marine Insurance Co.*, L. R. 1 C. P. 320; *Callaway v. Ward*, 1 Ves. Sr. 318.

GWYNNE, J.—By an indenture, bearing date the 15th day of November, A.D. 1824, the Venerable George Okill Stuart, therein described of the town of Kingston, Archdeacon of York, the Honorable George Herchmer Markland, and John Macaulay, as trustees of the letters patent, dated 19th January, 1824, referred to in *Lyster v. Kirkpatrick*, (26 U. C. R. 217), demised to one Picord, for the term of 21 years, town lot No. 12, on block letter G., in the town of Kingston. That lease contained a covenant by Picord to erect a house upon the demised premises, and also a covenant, informally drawn, whereby Picord was made to covenant that, at the expiration of the lease, the lessors, or the survivor or survivors of them, should pay for the house so to be erected at a valuation; but the lease contained no covenant for renewal. This lease, by mesne assignments, became assigned to one Felix Campbell in the month of August, 1833.

By indenture, dated 19th October, 1837, made between the Venerable George Okill Stuart, Archdeacon of Kingston, of the one part, and Felix Campbell of the other part, the said George Okill Stuart, as one of the trustees of lot letter G., in the said town, demised, &c., unto the said Campbell said lot 12 on lot letter G., together with other lands on the same lot, for 21 years from 24th January then next. By that indenture Campbell covenanted, among other things, to erect, within two years from date, on the front of the said lot No. 12, a building of stone of certain dimensions, “and upon a plan to be approved by said Archdeacon, his heirs or assigns, who will take the same at the

end of the said term at the valuation of indifferent persons, to be chosen by the parties to these presents mutually." This indenture contained no covenant for renewal.

Campbell, having erected the house, in pursuance of his covenant, by his will, dated 12th June, 1847, devised same and said lot No. 12 to one Thomas Campbell. Thomas Campbell, by indenture, dated 23rd May, 1850, after reciting the lease of 19th October, 1837, and that Felix Campbell had erected the house, according to a plan approved of by the said George Okill Stuart, the death and will of Felix Campbell, assigned said lot and the house thereon erected to James Shaw, the plaintiff, for the residue of the said term, by the indenture of the 19th October, 1837, granted, under and subject to the terms of that indenture, together with all the right, title, and interest of said Thomas Campbell in and to the improvements thereon made and being.

The term so created expired on the 24th January, 1859. The lessee's right, and Shaw's right, as assignee of the lease, was, by the terms of the indenture, limited to a claim upon the grantor, George Okill Stuart, for payment of the value of the erections which had been made in accordance with the plan approved by him. However, upon that 24th January, 1859, Mr. Stuart, who was then also Rector of Kingston, as he had been since October, 1836, by indenture, expressed to be made between George Okill Stuart, of the city of Kingston, *Rector of Kingston*, of the first part, and James Shaw, of the second part, devised the same lot No. 12 to said James Shaw for the term of five years, yielding and paying therefor the same ground rent as had been reserved by the indentures of January, 1824, and October, 1837, viz., £12 per annum, *unto the said George Okill Stuart, Rector of Kingston, his successor or successors*.

This indenture contained the following covenant: "And the said party of the first part, for *himself, his successor or successors*, hereby covenants with the said party of the second part, his executors, administrators or assigns, to

pay to him or them, *at the expiration* of the said term of five years, the value of the buildings *then* erected upon said premises, according to the valuation of indifferent competent persons, to be chosen by the parties to these presents, or else to renew the lease of said premises for a further term of not less than ten years from the day of the expiration of the present lease, upon the same terms and covenants as are herein contained and expressed, with a perpetual running covenant for payment at a valuation, or renewal."

By the indenture of October, 1837, Mr. Stuart, professing to act as one of the trustees of the letters patent of January, 1824, demised the premises in question to Campbell for a term of 21 years, at the said yearly rent of £12. By that indenture Campbell covenanted to build on the premises, within two years, a stone building, upon a plan to be approved by the said George Okill Stuart, "*his heirs and assigns, who will take the same at the end of the said term at the valuation of indifferent persons, to be chosen by the parties to these presents mutually.*" The obligation to pay was expressed by the deed to be imposed only upon the said George Okill Stuart *personally*, his heirs and assigns; at the expiration of that lease the lessee had no right, conditionally or otherwise, to demand a new lease for a renewed term, nor do the parties seem to think that any such right existed; for if the lease of 1859 had been executed in pursuance of any right which it was supposed existed entitling the lessee to a renewal lease, if not paid for the buildings, the term no doubt would have been for 21 years as before, and not for five years. We must, I think, regard the lease of 1859 as embodying a totally new contract, whereby the lessor, being Rector of Kingston, of which rectory the premises in question constituted part of the glebe, affected to transfer from himself and his personal representatives the obligation he had incurred by the lease of October, 1837, to his successors, in the corporate character of Rector, and so to attempt to subject this piece of glebe property to perpetual renewal leases, of not

less than ten years' duration, at the old rent at which the premises had been let in 1824, unless the successor of Dr. Stuart, in the character of Rector, should pay the value of the buildings, which, intentionally, or incautiously and imprudently, Dr. Stuart had by the lease of 1837 imposed upon himself, personally, the obligation of paying.

This lease, then, so executed by a Rector of a portion of his glebe property, whatever force it may have had, and doubtless had, in so far as the term thereby granted is concerned, against Dr. Stuart, the then incumbent, was void as against his successors: *Sale v. Bishop of Coventry* (1 And. 241-4); *Morrice v. Antrobus* (Hardress, 326); *Lincoln College Case* (Co., Part 3, 60 a); Co. Litt. 45, a; *Bishop of Salisbury's Case* (10 Co. 60 b, note D).

By the special case it appears that Dr. Stuart died in or about the month of September, 1862.

It is unnecessary to inquire whether acceptance of rent by his successor, as incumbent of the rectory, would have made the lease good as against *him* for the residue of the term, as to which see *Rickman v. Garth* (Cro. Jac. 173); for the special case states that Dr. Lyster, the present Rector of Kingston, was inducted as Rector in or about the month of June, 1864, and that he, when he became Rector, disavowed the lease and refused to be bound by it, or to carry out any of its provisions, or to receive any rent from the plaintiff in respect of the lease.

The term by the lease granted had expired on the 24th January, 1864, before Dr. Lyster was inducted into the rectory.

The policy in question was first effected on the 5th day of November, 1863, more than a year after the death of Dr. Stuart, when the term became determined in law, the lease having no validity as against his successor. The case does not state whether any immediate successor of Dr. Stuart, before the induction of Dr. Lyster, had in any manner recognized the plaintiff as entitled to hold as tenant under the lease. Assuming, however, the lease to have been recognized by the then rector, if any there was,

when the policy was first effected in November, 1863, it is plain from the admissions in the special case that upon *all* the occasions of the renewal of the policy in 1864, 1865, 1866, and 1867, the owner of the freehold in the premises, and who alone could give to the plaintiff any interest in the insured premises, wholly repudiated all right in the plaintiff to the possession which he held, and disavowed being under any obligation to him whatever, by reason of the terms of the expired lease or otherwise howsoever, and he would not accept or recognize him as his tenant.

The special case states that on the 9th day of March, 1868, Dr. Lyster, the Rector of Kingston, obtained judgment by default in an action of ejectment brought against the plaintiff and plaintiff's tenants to recover possession of the said premises, and on the same day a writ of *habere facias possessionem* was issued thereon, but said writ was not placed in the sheriff's hands: the fire which destroyed the premises took place on the night of the 9th of March, 1868. When the summons in ejectment in this action issued is not stated, but it must have issued at latest and been served upon the 21st day of February, 1868. It is admitted in the special case that the plaintiff was informed by his attorney that a pending appeal in the case of *Lyster v. Kirkpatrick*, referred to in the case, involved questions similar to those affecting his rights under the said lease, and that the decision in that case would decide the plaintiff's, and that such appeal was not decided until March, 1869.

There appears to be a difference between this case and that of *Lyster v. Kirkpatrick*, arising from the difference in the provisions of the lease in this case antecedent to that of January, 1859, and in the leases referred to in *Lyster v. Kirkpatrick*; but, assuming the plaintiff's case to be identical with that of Kirkpatrick in *Lyster v. Kirkpatrick*, still, as the result of the decision in *Lyster v. Kirkpatrick*, when applied to the plaintiff's case, in effect is, that the plaintiff had no title or interest in the premises in question as against the present Rector at any

time since his incumbency, that the lease under which plaintiff claims was always void as against the present Rector, we must decide the case submitted to us upon the foundation of *what* the decision *was*, unaffected by any question as to the *time when* it was so conclusively decided in appeal.

The case, then, as stated to us, must be taken to be that, although the plaintiff enjoyed the benefit of the term granted by the lease of January, 1859, during the life of the Rev. George Okill Stuart, Rector of Kingston, the grantor thereof, yet that at the time of the induction of Dr. Lyster, the present Rector, the said term had expired, and the continuance of the plaintiff in possession of the premises in question, subsequent to the induction of Dr. Lyster, was wholly illegal and without any title whatsoever; that such possession was a trespass upon Dr. Lyster, and was attributable to no right or title whatsoever other than the mere sufferance of the rightful owner, such sufferance being evidenced only by the rightful owner not proceeding to evict the plaintiff until February, 1868, when, treating the plaintiff as a trespasser, as he no doubt all along was, he proceeded to evict him and his tenants by action of ejectment, in which action the plaintiff, having no defence, suffered judgment by default to be recovered against him. The special case indeed admits, and of necessity admits, the whole of the matter upon which, in my opinion, the question submitted to us depends—namely, that ever since the induction of Dr. Lyster, as rector of Kingston, in June, 1864, the possession by the plaintiff of the premises in question was in law wrongful, and that he had not, either as tenant or otherwise, any interest recognizable at law or in equity in the premises which was capable of being damnified or affected in any manner by the destruction of the house by the risk insured against.

I express no opinion whether the plaintiff can or cannot recover against the personal representatives of Dr. Stuart under the covenant contained in the lease of January, 1859, for the value of the house which was upon the premises

at the expiration of the term thereby granted. It is for the value of the building at the expiration of that term that the personal representatives of Dr. Stuart were liable, if they were liable for anything. The action for such value accrued, if at all, at latest, upon the expiration of the term by effluxion of time, in January, 1864. The covenant was to pay, *at the expiration* of the term, the value of the buildings *then* erected, to be ascertained by valuation, *or else* to renew. After his death Dr. Stuart could not renew, and his successor not being bound to recognize, and wholly repudiating, the plaintiff's claim, his executors could not procure a renewal; so that nothing remained but an action on the covenant for damages against Dr. Stuart's representatives, who had no interest whatever in the premises, and whose liability, if any, having attached before the renewal of the policy, which was effected in 1864, could not be altered by any destruction of the property which might occur in 1865, or any subsequent year. Such a naked covenant for damages could not, in my opinion, give to the covenantee any insurable interest in property which, upon the covenant coming into operation so as to give a cause of action, was *ex præmissis* the property of a total stranger to the covenantor, unaffected by any covenant, qualification or condition.

It was not argued, nor in my opinion *could* it have been, that the right, if any, of the plaintiff to recover against Dr. Stuart's personal representatives was contingent upon the house continuing in existence until the damages, to which the plaintiff should be entitled in an action on the covenant, should be ascertained, so as to support a contention that the plaintiff had an insurable interest in the house until the damages should be ascertained, although not in possession of the house, and although in fact he might have been evicted therefrom by Dr. Lyster in 1864.

The right of the plaintiff, if any, to recover in an action against the personal representatives of Dr. Stuart, was complete in 1864, and could not be affected by the loss of the house by fire in 1868. I am of opinion, therefore, that

the plaintiff had no interest in the house at the time of the loss, and has not suffered damage in the eye of the law by the destruction of the house by fire, and that judgment therefore should be for the defendants.

HAGARTY, C. J.—The last lease expired in January, 1864. The present Rector was inducted in June following. Since that time plaintiff and his undertenants have apparently paid no rent for the premises. Dr. Stewart, the plaintiff's lessor, died. The new Rector disputed the lease given by Dr. Stewart, never acknowledged it as binding on him, and recovered judgment in ejectment against plaintiff and his undertenants on 9th March, and issued *hab. fac. poss.* thereon, which, however, was not delivered to the sheriff. On the succeeding night the premises were burned.

The judgment in ejectment is proof of the then plaintiff's right under the old law from the day of the demise, and now, it is presumed, from the date of the writ of summons.

The mere recovery in ejectment by another would be far from concluding the plaintiff's right to recover his insurance, as several cases may be readily supposed where, although not entitled to hold the possession, his right to insure would be clear; *e. g.* when he had granted a term to another and then refused to give him possession, or where a mortgagor is ejected, &c., &c. But in this case the whole extent of plaintiff's interest is stated. It all depended on the lease from the former Rector.

In the case of *Stevenson v. London and Lancashire Insurance Company* (26 U. C. 148) the Queen's Bench decided that the underwriters could not defend themselves on the ground that plaintiff's house was, by mistake, on land to which he had no title, in consequence of a mistake as to the true boundary of his lot. It is stated, "there was no proof that any proceeding had been taken to eject the plaintiff by the true owner of the land, nor that the plaintiff was a party to the suit or proceeding, by which the true boundary line was established." It was also considered that under the statutes the insured might have a

claim for compensation for his improvements where the mistake arose from an unskilful survey. Draper, C. J., concludes with these words: "We cannot at present accede to the conclusion that an insurance company, with whom the actual occupant of a house, without fraud or wilful misrepresentation, effects an insurance thereon, can set up the legal title of a stranger to the land, on which the house stands, against the claim of the assured. It is, we believe, a novel experiment, we do not think it a creditable one, and, in the absence of direct binding authority, it has no intrinsic merit to entitle it to success."

The case before us differs in a very important respect. The title of the third person has been asserted and ripened into judgment, determining apparently the whole of plaintiff's interest in the subject of insurance. It is not easy to see how, as regards the title, he was in any better position on the night of the fire than if on the preceeding day he had made a conveyance of all his interest to Dr. Lyster or any third person, not having actually left the possession.

In *Powles v. Innes* (11 M. & W. 10) it was held that where a person assigns his interest in a ship or goods, after effecting a policy, and before the loss, he cannot recover except as a trustee for the assignee, when the policy is handed over with the assignment, or there is an agreement that it be kept alive for his benefit.

If a man held land *pur autre vie*, on which he had a house insured, and it was burned the day after the life dropped, it seems to us that in the absence of any conditions as to paying him for improvements or allowing their removal, that he could not recover on a contract which is held to be one of indemnity.

In plaintiff's lease, the lessor, Dr. Stewart, does not profess to demise especially as Rector. He is described as "George Okill Stewart, of the City of Kingston, &c., Rector of Kingston, in pursuance of the statute in such case made and provided, of the first part": no further mention of "Rector" in the lease. The covenant is, "And the said

party of the first part, for himself, his successor or successors, hereby covenants with the said party of the second part, his executors, &c., to pay to him or them, at the expiration of the said term of five years, the value of the buildings then erected upon the said premises, according to the value of indifferent persons to be chosen by the parties to these presents, or else to renew the lease of the said premises for a further term of not less than ten years from the day of the expiration of the present lease, upon the same terms and covenants as are herein contained and expressed, with a perpetual running covenant for payment at a valuation, or renewal."

Dr. Stewart died before the expiration of the term: his successors refused to be bound by his covenant. If Stewart's representatives were liable to an action for breach of this covenant to pay or renew, it would seem that plaintiff would have had an insurable interest. He would seem, in Lord Eldon's words (in *Lucena v. Crawford*), to have "a right derivable out of some contract about the property."

In *Heckman v. Isaac* (6 L. T. N. S. 383, Q. B.) a man had covenanted to keep insured two sets of premises, demised to him by one instrument, for five and sixteen years respectively, for a named sum during the said terms. After the first term had expired he contended that he was not bound to insure the premises on the expired term, as he had no insurable interest. The court held that he was still bound by the covenant. Crompton, J., adds, "The covenant to insure would give an interest."

Here, if lessee built a house, he considered he had his landlord's covenant to pay him for it or renew his lease. During the term he undoubtedly had an insurable interest.

In 1 *Arnould*, 229, it is said, after noticing the difficulty of precise definition, "It is sufficient to have a right in the thing insured, or a right derivable out of some contract about the thing insured, of such a nature that the party insuring may have benefit from its preservation and prejudice from its destruction."

But I agree with my brother Gwynne that whatever rights plaintiff might have against his lessor's estate (on which I express no opinion), those rights must be as they were at the end of the term.

In an ordinary case between landlord and tenant, with such a covenant, as soon as the landlord elected not to renew, he should consider the premises his own, and might protect his interest in the buildings by insurance, knowing that if they were burned they must be valued as against him as they stood when his tenant's interest determined.

I think the defendants are entitled to judgment. I adhere fully to the decision in 26 U. C. 148. When no third person is asserting title I see no right in the underwriters to try a possibly intricate real property question in an action on their contract.

There are cases of course, as under the Mutual Insurance Statutes, where the insurers have expressly the right to say the assured had not the estate he represented.

GALT, J., concurred.

Judgment for defendants.

REGINA V. STRACHAN.

Conviction for selling liquor without license—Return of magistrate conclusive—
32 Vic. ch. 32, sec. 6, sub-sec. 6.

A license to sell spirituous liquors, whether by wholesale or retail, is now necessary either in the case of a tavern or a shop, and in the case of a shop it must not be consumed on the premises or sold in quantities less than a quart. Therefore, the sale of a bottle of gin without a license is contrary to law; and *Seemle*, that even if a license be necessary only on a sale by retail, the sale of a bottle, value sixty cents, would be a sale by retail.

It is not necessary, in a conviction for selling liquor without license, to mention the statute under which the conviction took place; nor that it should appear on the face of the conviction that the prosecution commenced within twenty days of the commission of the offence, nor to specify that it is a first or second offence; nor to whom the liquor was sold; neither is it illegal to award imprisonment in default of distress, &c.

The informer is a competent witness in cases arising under 32 Vic. ch. 32 (Ont.)

In this case the depositions returned to the court by the convicting magistrate under a *certiorari*, shewed that there was no evidence of a license produced before him, while the affidavits filed on the application to quash stated that the party had a license in fact and produced evidence of it before the magistrate, who, moreover, himself swore that he believed a license was produced, but it was either not proved or given in evidence:

Held, that the return to the *certiorari* was conclusive, and that the court could not go behind it.

Per Gwynne, J., that although no new by-law had been enacted by the municipality under sec. 6, sub-sec. 6, of the above act, the applicant was bound to have paid for the license, which he had in fact obtained, the amount due under the by-law then in force, and that the payment, after complaint, but before judgment, of the sum fixed by the latter act did not enure to make the license valid from its date.

A WRIT of *certiorari* was issued 31st August, 1869, to return the record of conviction and all things touching the same into this court.

The conviction returned was dated 12th July, 1869, under the hand and seal of the police magistrate, and stated "that he, the said William Strachan, did on the 7th June, 1869, in the said city of Toronto, sell spirituous liquor, to wit, one bottle of gin, at and for the sum of sixty cents, of lawful money of Canada, without having first obtained a license authorizing him so to do, and George Albert Mason, of the said city, detective, is complainant; and I adjudge the said William Strachan, for his

said offence, to forfeit and pay the sum of \$30, to be paid and applied according to law, and also to pay to the said George Albert Mason the sum of \$2.85 for his costs in this behalf; and if the said several sums be not paid forthwith I order that the same be levied by distress, &c.; and in default of sufficient, &c., I adjudge the said William Strachan to be imprisoned in the common jail of the said city of Toronto for the space of thirty days, unless the said several sums, &c., and all costs, &c., of distress and commitment and conveying of the said William Strachan to the said jail shall be sooner paid."

The evidence taken before the police magistrate was also returned.

In Michaelmas term *J. A. Boyd* obtained a rule to quash the conviction on the following grounds: 1st, That it did not appear the liquor was sold by retail, and might have been sold wholesale; 2nd, Not shewn whether he should have had a tavern or shop-license, nor under what statute or law he was convicted, or that any license was required; 3rd, It did not sufficiently appear that he was not licensed; 4th, It was proved in fact he had a license to sell, and the magistrate wrong in holding such license invalid because no sum had been paid to the municipality therefor, and the subsequent payment related back to the issue of the license, &c.; 5th, It was not proved that any by-law or order was passed before the conviction or information, or after the Tavern and Shop License Act of 1868, by police commissioners or municipality, fixing any sums to be paid for a license to sell liquor, without which the license was valid; 6th, Not shewn in conviction that prosecution commenced within twenty days after commission; 7th, Illegal to award imprisonment in default of distress and commitment and conveying to jail; 8th, Illegal to award imprisonment in common jail of the city of Toronto; 9th, Not stated to be a first or a second offence; 10th, Not stated to whom the liquor was sold; 11th, Informer not a competent witness, and if his evidence withdrawn, nothing left to support conviction.

Harrison, Q. C., shewed cause, citing *Regina v. Falkner* 26 U. C. 529 ; *Re Barrett*, 28 U. C. 559.

Read, Q. C., and *Boyd*, contra, cited *Rex v. Ferguson*, 3 O. S. 220 ; *Rex v. Gill*, Str. 190 ; *Oake's Mag. Syn.*, 87, 103, 327, 343 ; *Regina v. Johnson* 8 Q. B. 102 ; *Andrew v. White*, 18 U. C. 170 ; *Re Pater*, 10 Jur. N. S. 972 ; *Ex parte Vaughan*, L. R. 2 Q. B. 114 ; *Rex v. Smith*, 8 T. R. 588 ; *Rex v. Hale*, Cowp. 728 ; *Rex v. Catherall*, 2 Str. 900.

The statutes cited are referred to in the judgment.

HAGARTY, C.J.—The Statute of Ontario (32 Vic. ch. 32) professes to amend and consolidate the several enactments relating to tavern and shop licenses, and repeals expressly a number of sections in the municipal acts bearing on this subject, and also “all other acts or parts of acts which may be inconsistent with this act.”

Section 1 declares that no person shall sell by retail any spirituous liquors, &c., without having first obtained a license authorizing him so to do, as thereafter provided.

By section 6 municipal councils may pass by-laws for granting certificates to obtain tavern licenses, &c., &c., and also licenses for the retail of such liquors, in quantities not less than one quart, in shops or places other than taverns.

The act does not, apparently, prescribe any other kind of shop licenses than as above.

The clause in the municipal act of 1864 (sec. 252), that no tavern or shop license is necessary for selling liquors in original packages, containing not less than five gallons or a dozen bottles, is repealed by the Ontario Act.

No exception seems now to exist, and a license seems necessary in all cases for selling liquors, and in the case of a shop it must not be consumed on the premises, or sold in quantities less than a quart. Therefore, it seems to us that the sale of a bottle of gin without a license is contrary to law.

Even if a license be only necessary in a sale by retail, I think we would assume a sale of a bottle, value sixty cents, would be a sale by retail.

I think, the first objection fails. The second is also unfounded: it cannot be necessary to name any statute; and it is equally illegal to sell without license, whether tavern or shop.

The 3rd objection I think requires no answer.

I pass over for the present the 4th and 5th objections.

The 6th is, that it is not shewn in conviction that prosecution commenced within twenty days of commission of offence.

As a matter of fact the prosecution was commenced within a couple of days of the 7th June, the day on which the offence is charged. It was postponed several times, and the conviction was not made till July 12th. This appears on the return to the *certiorari*.

On the face of the conviction it certainly does not appear that the prosecution was commenced within twenty days, and its own date (12th July) is over thirty days from the 7th June, the day of the offence. But *Wray v. Toke* (12 Q. B. 492) is express authority the other way. Lord Denman says, "It is objected that it does not appear that the prosecution was within three months after the offence. The answer is, 1st, That this limitation, being entirely distinct from the enactment creating the offence, is matter of defence and need not be noted in the conviction, and 2nd, That the form given by the statute dispenses with the mention of it, had it been otherwise necessary." Erle, J., "The limitation of time is in a clause subsequent to the penal section and would be matter of defence." See also *Rex v. Woodcock* (7 East, 146).

In our case the penal section is sec. 22. It is sec. 25 which gives the limitation of twenty days and the procedure.

This section refers to the forms in the act mentioned in the next section, and the form of conviction is substantially followed.

In re Allison (10 Ex. 568) Parke, B., says, "If justices substantially follow the forms given by the 11 & 12 Vic. ch. 43, they do all that is required of them. If this were

not so, the act itself would prove only a snare to entrap persons." See also *Moffatt v. Barnard* (24 U.C. 498) and *Egginton v. Lichfield* (5 E. & B. 103.)

7th Objection.—Sec. 25 of the Ontario Act directs that the magistrate shall proceed in a summary manner according to the practice and procedure, and after forms contained in chap. 103, Consol. Can.

This conviction seems to follow the form given at page 1111 to that act, and is, I think, good against the objections thus taken. Sec. 31 of Ontario Act seems in substance to make the same provision as to distress, imprisonment and costs: see the last section of the act as to forms governing.

8th Objection.—I see no valid objection to awarding the imprisonment to be in the common jail of the city of Toronto. Section 31 says that if no sufficient distress the the justice may order imprisonment in any common jail within the county in which the conviction was made.

24 Vic. ch. 53, sec. 11, says that the court house and jail and other county buildings of York and Peel shall be held to be within the county and city respectively for all purposes of the administration of justice; and by sec. 12, after a day named, such jail, &c., may be used as the jail, &c., of and for the city; and by sec. 16, the county court may arrange with the city for the maintenance of the county prisoners in the city jail.

The Ontario Act (32 Vic. ch. 6, sec. 22) reunites the city to the county of York for judicial purposes. Sec. 24 declares that nothing therein shall affect existing arrangements between the city and county respecting the use of the jail.

I think the commitment to the common jail of the city is sufficient in law.

9th Objection.—I think it is not necessary to specify that it is a first or second offence. Sec. 22 provides a fine only for the first offence; for a second or third, or after offence, the punishment is an increasing imprisonment, without fine. This being only for a fine must be for a first offence.

10th Objection.—It seems to me that the conviction must not necessarily state to whom the liquor was sold: the offence is selling liquor without license. If the informer saw defendant selling to one or more persons, whose names were unknown, and who left the premises unrecognized, the offence would be complete, and all the conviction could state would be selling to some person or persons unknown.

It was urged that if no person was mentioned, there would be a difficulty if he were again charged with the offence for which he had actually been fined. Evidence outside the conviction would in every case have to be resorted to to prove the identity of the charge. Similarity of name would not alone be sufficient, and where name wholly unknown, it would especially be a question of external evidence. Doubtless all carefully drawn forms mention the name of some vendee, or if unknown it is so stated. *Rex v. Gibbs* (1 Str. 497) was for selling to divers persons unknown. The court held it sufficient, saying, "It is an offence, let it be sold to whom it would: indictment for the murder of a person unknown is good." *Wray v. Toke* (12 Q. B.) was a conviction on statute 11 Geo. IV. and 1 Wm. IV. ch. 64, sec. 13: "Every seller of beer, &c., who shall permit any person or persons to be guilty of disorderly conduct in his house shall forfeit, &c." The conviction was for permitting drunkenness and other disorderly conduct in the house, &c., not naming any drunkard. On objections taken it was held sufficient.

Lord Denman, sitting with Coleridge, Patteson, and Erle, JJ., says: "It appears to us that the names of the drunkards would be often unknown when the house was closed, or the inmates were strangers to the informers, and that the requirement of the names would lead to no good purpose * * the statement of them would not be wanted to shew that he had been before convicted; for if he can incur two penalties in the same day for such permission, about which we give no opinion, it is clear that the same persons may be the drunkards on both occasions, and so their names would not prove the identity of the offence.

We cannot distinguish this case from that before us.

11th Objection.—This is disposed of by the 25th section, which declares that the prosecutor or complainant shall be a competent witness, and section 27 says that no person shall be rendered incompetent as a witness by reason of being entitled to a portion of the penalty.

It remains to consider objections 4 and 5. It is insisted in the affidavits filed that applicant had a license in fact, and produced it in evidence, and we are then asked to review the magistrate's decision, and hold that such license was a full defence to the applicant. On the other hand, the depositions returned to us on the *certiorari*, shew no evidence of a license, although two witnesses say that there was a license nailed up in the shop, and a clerk in the city chamberlain's office swears he received money for Strachan's shop license some days after the 7th June. An affidavit of the magistrate is produced, in which he swears he believes a license was produced in court by Strachan, but it was not either proved or given in evidence.

Mr. Baxter, a magistrate, swears he was on the bench with the police magistrate, and on the hearing Strachan produced his license for 1869 for selling liquor, granted to him on 5th March, and it was received in evidence, but no effect was given to it, and that he (Baxter) did not consider it operative, because the amount payable to the chamberlain had not been paid at the time the sale took place.

This shews a very unpleasant controversy as to the facts of the case. I do not see how we can go behind the evidence as returned to us on our writ, verified as it is by the oath of the police magistrate. It would be as unseemly as it would be inconvenient to have to decide as the applicant urges us; in effect, to refuse to believe the return made to us. One of the results of our so deciding would be that affidavits could be used to shew that a witness deposed to something quite different from what appears in his deposition, or that he said something not taken down, on which the validity or invalidity of the convictions might depend. I think we cannot be asked to do this,

and some other remedy must be sought where a magistrate is charged with wilfully suppressing evidence, &c., &c.

The law is fully discussed in *Regina v. Bolton* (1 Q.B. 71). Lord Denman says: "The question of jurisdiction does not depend on the truth or falsehood of the charge, but on its nature. It is determinable on the commencement, not on the conclusion of the enquiry; and affidavits, to be receivable, must be directed to what appears at the former stage and not to the facts disclosed in the progress of the enquiry." He cites approvingly two cases; the first, *Brittain v. Kinnaird* (1 B. & B. 432), and in what he calls the admirable judgment of Richardson, J.: "The fallacy lies in assuming that *the fact* which the magistrate has to decide is that which constitutes his jurisdiction;" and again, in *Cave v. Mountain* (1 M. & Gr. 257), Tindal, C. J.: "If the charge be of an offence, over which, if the offence charged be true in fact, the magistrate has jurisdiction, his jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." Lord Denman proceeds, "Much was said of the unreasonableness of the conclusion drawn by the magistrates, and of the hardship on defendant if we would not review it there being no appeal to the Sessions. * * * We must not constitute ourselves into a Court of Appeal when the statute does not make us such, because it has constituted no other."

In *Re Bailey* (3 E. & B. 618) Lord Campbell says: "It would be open to the prisoners to shew that the justice had no jurisdiction, and if they shewed there was no evidence before the justice on which he was warranted in coming to the conclusion that there was a contract of service and a breach of it, I think this would shew that he exceeded his jurisdiction." Wightman, J.: "The justice is not bound to believe one side more than another, and therefore if there was evidence before him from which he might reasonably infer that there was such a contract, it is enough." Crompton, J.: "We cannot interfere unless we

see it made out negatively that there was no evidence to warrant the justice's finding."

The defendant's point here is, not that the magistrate had not jurisdiction to hear and determine the charge, but that when the defendant produced his license there was no evidence to convict. I think we are bound to hold here that no such license was proved or given in evidence, for the reasons I have already stated. In this view I need not discuss the point as to the alleged insufficiency of such license if properly proved.

In *Re Barrett* (28 U. C. 560) it is said: "The general rule of law being that the sale of spirituous liquors is forbidden, except by certain qualified persons, it is not unreasonable to hold that they shall, on their right being questioned, prove their right and exemption from the prohibition."

The same case also bears upon another point taken in argument: "It may be, though all *appeal* is taken away by section 25 of the Ontario Act, that the remedy by *certiorari* is still in force to have a review of questions of law."

Conceding that our right to examine these proceedings is not taken away, we cannot but see that the whole tendency of recent legislation is to prevent appeal, and make the decision of the magistrate final. Our interference should be, at all events, scrupulously limited to matters of strict legal bearing.

It is singular that a conviction drawn up in the police office of Toronto, under experienced eyes, should be so very loosely worded as to have afforded ground for serious argument on so very many objections as the ingenuity of Mr. Boyd has raised. The time spent in the necessary investigation of the many cases and statutes cited might have been saved by the easy adoption of a form of conviction clearly defining the offence, and shewing the jurisdiction complete as to time, &c. Vague terms, like "a bottle," without statement of capacity, should be avoided. It would be well always to state that the sale was by

retail, and the quantity less than the limit prescribed by law, and the name of the person to whom it was sold, if known, and that the information was laid in proper time, &c.

GWYNNE, J.—I entirely concur in the judgment of the Chief Justice, that we cannot, for any of the objections taken, quash this conviction.

As to the 4th and 5th objections, they relate to matters of fact which are properly the subject of appeal, and which, whether the right of appeal had or had not been taken away, could not be inquired into upon a motion to quash the conviction. Whether the defendant had or had not a license, in fact, was a matter proper to be inquired into by the magistrates before conviction, and the conviction finds that he had not. We cannot now open that point and receive affidavits to establish that he had. In the argument it was contended that the point arising under the 4th and 5th objections was in reality one of law, namely, whether, admitting that the defendant had a license in fact and that he had produced it, it was or not valid in law by reason of his not having paid any sum to the municipality in respect of the license before the time that the complaint had been laid, the contention of the defendant being, 1stly, that there was nothing payable to the municipality, inasmuch as there had been no new by-law enacted since the passing of 32 Vic. ch. 32 under sec. 6, sub-sec. 6 of that act; and 2ndly, that admitting there was a sum payable to the municipality, the defendant having paid it after the complaint lodged, and before judgment, the payment enured to make the license valid from its date. As the point was argued, I have considered it, and it may be perhaps as well that I should express the opinion I have formed upon it. By the 14th sec. of 32 Vic. ch. 32, it is enacted that the license shall issue upon a certificate granted by the commissioners of police, and that upon the production of such certificate to the issuer of licenses, and payment to him of the provincial duty thereon, he shall issue

a license to the applicant, *provided always, that the said license shall be invalid, inoperative and of no effect until the said applicant shall have paid* to the chamberlain or treasurer of the municipality, the sum fixed therefor by the said municipality, in manner in this act provided, for the use of the said municipality, and shall have obtained a receipt for such payment endorsed on the license. By the 3rd section it is enacted that, "over and above the sum which may be imposed by municipalities as hereinafter provided, there shall be paid for each shop license the sum of twelve dollars, into the consolidated fund; then by section 6 it is provided, among other things, that the commissioners of police in cities *may pass by-laws* for regulating the sums to be paid for such licenses; and section 10 enacts that the sum to be paid for a shop license, in addition to the provincial duty hereinbefore imposed, shall be *such a sum as shall be fixed by by-law as aforesaid*, and, including the provincial duty, shall be *not less than fifty dollars*.

In argument it was admitted that at the time of the passing of 32 Vic. ch. 32, there was a by-law in force regulating the amount to be paid for a shop license in the city of Toronto, under sec. 249 of 29-30 Vic. ch. 51. Now, although this section is repealed by 32 Vic. ch. 32, I do not see that it follows that the by-law enacted under its authority has been repealed. It was enacted by the same authority as 32 Vic. ch. 32 also empowers to make by-laws upon the same subject. The object of the repeal of section 249 and subsequent sections of 29 & 30 Vic. ch. 51 is but for the convenience of the consolidation created by 32 Vic. ch. 32, and the 10th section of this latter act, as it appears to me, is to be read as providing simply that the sum to be paid for the license, in addition to the provincial duty, shall be such a sum as shall *from time to time* be fixed by by-law as aforesaid, but (by-law or no by-law) *never less than fifty dollars* for a shop license including the provincial duty; so that at the time of issuing of the license, said to have been issued to the defendant in the month of March, 1869, there must have been some amount

payable to the municipality, although there may have been no new by-law enacted by the police commissioners after the passing of 32 Vic. ch. 32, and until the payment of which the license by the 14th section of the act was invalid, inoperative and of no effect, notwithstanding the payment of the provincial fee of twelve dollars. This appears to me to be the true construction to be put upon the act, and the result is that the defendant, having sold liquor before he had paid the sum which was payable to the municipality, did so without a license and had exposed himself to the penalties of the law.

GALT, J., concurred.

Rule discharged.

SWITZER V. BROWN.

Judgment debtor—Examination where not resident—Order embracing both garnishment provisions of C. L. P. A. and those of sec. 41 Con. Stat. U. C. ch. 24—Pleading.

Held, on demurrer to the replication set out below, that under sec. 41 Con. Stat. U. C. ch. 24, that the judge of the county court can direct the examination of a judgment debtor to take place outside of the county where such debtor resides; but that the committal must be to the jail of the county where the defendant resides.

The plea justified the arrest and imprisonment of plaintiff under an order made by the county judge, embracing the enactments of the garnishment clauses for the attachment of debts and production of books and documents, and those of sec. 41 Con. Stat. U. C. ch. 24, and also under an order of commitment by such judge, which recited that it appeared from the examination that plaintiff had made away with his property in order to defeat or defraud creditors, especially plaintiff, and had not made satisfactory answers respecting same, and had not produced his books, as required by the order under which he was examined, with an averment that plaintiff did not on examination make satisfactory answers as to his property, &c., and it appeared to the judge that plaintiff had made away with his property (specifying certain effects), in order to defeat, &c:

Held, on demurrer, that inasmuch as, if the proceeding had been under above section 41 alone, plaintiff could under that section have been properly required to produce his books, and therefore an order adjudicating that he had not made satisfactory answers touching his estate and had not produced his books, after being required so to do, would have been sufficient, the court would not be warranted in holding the order set out in the plea void because it might be presumed, on a close verbal criticism of the words used, that the nonproduction of the books was only a default under the garnishment branch of the order (for which there could be no commitment), but would, on the principle of *Bullen v. Moodie*, 13 C. P. 137, intend that the judge acted on that part of the proceeding which was within his jurisdiction, unless it appeared clearly the other way.

DECLARATION in trespass and false imprisonment.

Pleas—1. Not guilty.

2. Justification under an order of the county judge of the county of Ontario, whereby plaintiff was ordered to attend before him at a place within such county and submit to be examined under the garnishment clauses of the Common Law Procedure Act, and to produce his books, papers, &c., and at same time and place to be examined touching his estate and effects and as to the property and means he had, &c., under sec. 41 of ch. 24. C. S. U. C.; *averment*, that plaintiff appeared and was examined under said order, and upon such examination it appeared to said judge that plaintiff did not answer satisfactorily as to his property and transactions respecting same, and had made away with his property, especially a certain horse, &c., in order to defeat or defraud defendant and other creditors, whereupon said judge, after summons served upon plaintiff, and no sufficient cause shewn by him, by order reciting that it appeared that plaintiff had made away with his property in order to defeat, &c., especially defendant, and had not answered satisfactorily respecting the same, nor produced his books as required, ordered plaintiff to be committed to the jail of the county of York (where plaintiff resided), &c, &c.

Replication, that plaintiff was a resident of the county of York at the time of the order made for his examination, and the judge had therefore no jurisdiction to order him to be examined in Ontario, and that his attendance for examination was voluntary and not under pressure of said order, and judge had no jurisdiction to order his committal.

Demurrer—1st. Replication confessed said second plea but did not avoid it by any new facts constituting a sufficient answer in law. 2. It set up, by way of pleading, no new matter of fact, but only matters of law, contrary to rules of pleading. 3. It sufficiently appeared from said plea that said judge had sufficient jurisdiction to make the order for plaintiffs oral examination, and such jurisdiction existed though plaintiff did not reside in county of Ontario.

That the process and orders of a county court are binding on parties to suits depending in such county court, though resident out of the county.

That order for plaintiff's examination before said judge, as also order for committal, legal.

4. That at all events, it appeared by said plea, that plaintiff did attend in the county of Ontario and was examined under said order, and he could not, therefore, be heard to say that there was any want of jurisdiction or irregularity.

That having so attended and having been examined within such county, and it appearing that his answers were unsatisfactory, and that he had made away with his property, books of account and other debts, in order to defeat and defraud the defendant and other creditors, said judge had full power and jurisdiction to order his committal. 5. That said plea shewed a sufficient justification of alleged trespass, and was not sufficiently met by replication.

The plea was also excepted to, the exceptions, as far as it is material to refer to them, being the exact converse of the objections taken to the replication.

Blevins appeared for the plaintiff, and *Harrison*, Q. C., for the defendant, and referred to the different sections of the statutes mentioned in the judgment.

HAGARTY, C. J.—The principal ground of this action of trespass is the assumption that the county judge cannot call upon a judgment debtor to appear for examination out of the county in which he resides.

The words of sec. 41, ch. 24, Consol. Stats. U. C. are :—
“In case any person has obtained a judgment in any court in Upper Canada such party, or any person entitled to enforce such a judgment, may apply to such court or to any judge, having authority to dispose of matters arising in such court, for a rule or order that the judgment debtor shall be orally examined upon oath *before the clerk of the Crown, or before the judge or clerk of the county court*

within the jurisdiction of which such debtor may reside, or before any other person, to be named in such rule or order, touching his estate," &c., &c.

This clause is in an Act expressly applicable in its terms to the county court as to the superior courts. It professes to regulate the law as to arrest and imprisonment for debt. Secs. 5, 12, 13, 15, 19, 22, 23, all expressly name the county court.

There is no doubt, I think, as to the applicability of this 41st section to county court judgments.

Section 22 of the county court Act (ch. 15, Consol. Stats. U. C.) provides that the county courts may issue writs of execution against the person's lands or goods, writs of subpœna, rules on the sheriff, and all other rules, orders and proceedings into any other county, to be served or executed therein, and judge's summonses and orders may be issued in like manner, and all such writs, rules, summonses, orders, and proceedings shall be of equal force and effect and as binding as if the same had issued from the court or by the judge of the county to or into which they may be so issued, and all subsequent proceedings thereupon shall be carried on in the court in which the action has been brought or the judgment entered.

Under the 41st section, I am of opinion that a judge of the superior court has the right to order the attendance of a judgment debtor for examination before the master of the court at Toronto, without reference to the county in which the debtor resides, or he may send him to the judge or clerk of the county court of the county in which he resides, or the judge may name any person he pleases, without reference to locality.

As a matter of practice the judges in chambers almost always order the examination to be held within the county in which the debtor resides; but the statute seems expressly to warrant an examination before the clerk of the crown or any person named in the order. The legislature probably considered it sufficient to indicate certain local officials, according to the fact of the debtor's residence,

leaving the special power to nominate any other person to the judge's discretion. When committed to jail, it must be to the jail of the county of residence.

It will be observed that under the garnishment clauses of the Common Law Procedure Act (sec. 287) it is provided that the debtor may be examined before the judge of any county, or before any clerk or deputy clerk of the crown, or before any other person to be specially named, without any restriction as to residence; and the same clause proceeds to enact that in case of a judgment in any county court, such court or judge, &c., may exercise similar jurisdiction in relation to such judgment, &c.

Conceding that the 41st section applies to county court judgments, it seems to me that I must hold that the county judge has the same right of naming a person in his order, before whom the examination should be had, as the superior court judge, unrestricted by the fact of the debtor's residence

It was admitted, on the argument, that he might undoubtedly summon the debtor from any county to shew cause before him why he should not be examined. It is suggested that he could shew cause by attorney without personal attendance, but that he would have to attend personally on the examination, perhaps, from a great distance.

Practically this would not often occur; especially if the plaintiff, as is admitted in the pleadings occurred in this case, had tendered to him, with the order for examination "a sufficient sum of money for his travelling expenses."

I cannot see my way to qualifying the words, "or any other person to be named in such rule or order," by adding the further words, "provided such person be within the county in which the debtor may reside."

It will be observed that the words, "within the jurisdiction of which such debtor may reside," are quite inapplicable to the subsequent words, "or before any other person." They can from this term apply to the words, "county court," and in no way to the words, "any other

person," even if the latter words had preceded the words, "or before the judge or clerk of the county court."

The county courts, under the section quoted from their Act, have the right to execute their process and orders in any part of this province. This general jurisdiction, except where otherwise expressly provided, is not regulated by the residence or non-residence within any particular county of either plaintiff or defendant.

I have therefore arrived at the conclusion, contrary to my first inclination of opinion, that the plaintiff fails on this branch of his case.

Before arriving at this result I had been considering the effect of his appearance and submission to be examined on the order, conceding that he could not have been compelled to appear out of the county of residence.

If the plaintiff's view be correct, the whole proceeding would be absolutely void, *coram non judice*, the examination worthless, and perjury could not be assigned for false swearing in his answers.

I have felt some difficulty in arriving at a clear opinion on this point, but on the whole I am hardly prepared to accede to this view.

When a judgment debtor is called on to appear for examination, and appears according to the exigency of the order, whether voluntarily or under its supposed pressure, and submits himself for examination, I am inclined to think that the examination is not extra-judicial, but that, when so taken and placed upon the files of the court, it becomes *the* examination, under the statute, of the debtor, and for all purposes may be treated as such, and all the legal consequences may flow therefrom. The statute merely provided a method for compelling his attendance for examination. When he submits without objection to the examination, it seems to me the judge's act in examining is not without jurisdiction. A defendant cannot be compelled to appear to an ordinary writ of summons, if resident in a foreign country, and sued for debt contracted abroad; but if he voluntarily appear, the objection is

waived and the suit proceeds: *Forbes v. Smith* (10 Ex. 721).

When the judge issues the order to attend, he may be ignorant that the debtor resides without the county. When the debtor attends he may submit to examination without disclosing the fact. I cannot bring myself to believe that he can so act, and afterwards insist that the whole proceeding was *coram non judice*.

In *Regina v. Shaw* (10 Cox. 66, 12 L. T. N. S. 470) the defendant was charged with perjury on the hearing of a charge before magistrates. On a case reserved, Erle, C. J., says: "No summons was proved at the trial of this indictment, and no written information warranting the issuing of the summons was proved; but, in my opinion and experience, where a party appears before a justice charged with an offence within his jurisdiction, the justice has jurisdiction to dispose of the case without a summons, or without any information in writing being laid before him, unless the statute creating the offence imposes the obligation of not hearing the case without these preliminaries. The whole of the proceedings may be drawn up at the time of the hearing." Blackburn, J.: "The substance of the objections was that the justices had no jurisdiction to hear the case, because, prior to the summons, there was no information or complaint; but none such was required prior to the summons. It might be essential to know that the charge was one of perjury, and that was a good reason for asking for an adjournment when the party appeared; but if he chose to waive the information and allow the hearing to proceed, the justices have jurisdiction." Smith, J.: "Unless it is required by statute, where a party voluntarily appears to answer a charge before a magistrate, no information or summons is necessary."

Regina v. Millard (6 Cox. 150) was to same effect. Parke, B.: "Unless the statute require that the information be on oath, it need not be on oath; unless it require it to be in writing, it need not be in writing. The question therefore before us is, whether the statute makes it a

condition in all cases that the information be on oath ; if it does, the conviction is wrong, but if not, it is right." Jervis, C. J.: "The magistrate may proceed without an information on oath, if he has jurisdiction over the subject matter, and has good reason for setting the law in motion."

This case is noticed in *Regina v. Pearce* (3 B. & S. 536).

I also refer to *Walker v. The Queen* (in Error, 8 E. & B. 439).

It remains to consider the objections to the subject matter of the commitment.

Plaintiff is called on to be examined as to any debts owing to him, and to produce all books of account, papers and writings, &c., &c., and at the same time and place to be examined touching his estate and effects, and as to the property and means he had when the debt was contracted, &c., and as to the property he then had, and the means he still had, of discharging the judgment, and as to the disposal he may have made of any property since contracting the debt.

This summons contains the subject of two enactments.

1. Under the garnishment clause for the attachment of debts and production of books and documents. 2. Under the 41 section for the residue.

The propriety of uniting both subjects of examination in one summons is questioned in *Bullen v. Moodie* (13 C. P. 137). The learned Chief Justice Draper says: "The order set out in the plea directs, in the first branch of it, an oral examination of plaintiff upon a subject matter with respect to which the judge in chambers had no power to commit, and in the second branch upon other subject matters with respect to which the power of committal is expressly given, if, among other things, the answers are not satisfactory to the judge." This case did not, however, decide that including both subjects in the one summons was in itself a fatal objection.

The order of committal, in the case before us, avers that it appeared from the examination that the said plaintiff had made away with his property in order to defeat or

defraud his creditors, and especially the then plaintiff, and that he did not make satisfactory answers respecting his property and his transactions respecting the same, and did not produce his books, as required in the said order.

As there is no power of commitment on the garnishment clauses we have to see that the causes of commitment here set out fall properly within the powers of the 41st section.

The only part of the order open to question is that as to the non-production of the debtor's books. This, in the order, is stated to have been required of him in the order for his examination, and on reference thereto it would certainly seem that such direction to produce books was in connexion with an examination in the garnishment clauses. The order set out says, to "submit to be examined *viva voce* on oath as to any and what debts are due and owing, or accruing, &c., and on such examination produce before the said judge all books of account, papers or writings, in said defendant's custody or control, in any way relating to such debts, and at same time and place to be examined, &c., touching his estate and effects, &c."

If plaintiff has been committed for non-production of books on an examination on the garnishment clauses, the order cannot, I think, be supported.

If the proceeding were wholly on the 41st section, I consider that the debtor, on the general examination as to his estate and effects, could be properly required to produce his books, if he kept any, and his refusal so to do would be a strong reason for holding his answers unsatisfactory. It would be absolutely necessary, on a proper examination as to a debtor's estate, that his books should be forthcoming. "If he refuses to disclose his property, or his transactions respecting the same," is one of the grounds of committal in the act.

In *Bullen v. Moodie*, as already noticed, the order for examination was like that before us. The order of committal was simply an adjudication that the answers to the questions put to him, on examination, respecting the several matters in the order for examination mentioned, were not

satisfactory to the judge. Draper, C.J., says: "Upon the face of this order it is left uncertain whether the answers which were unsatisfactory related to the first or second branch. * * But then the judge proceeded to make a judicial order, weighing the facts placed before him before he orders and adjudges the plaintiff to be committed. He had the answers before him on both branches, and had to decide as to their character in reference to his authority to commit, as well as to the propriety of his exercising that power. I do not feel that I can declare this order void, though I have doubted greatly whether there should not have been an averment that his decision proceeded on the second branch of the first order."

The plea before us contains an averment that on plaintiff's examination he did not make satisfactory answers respecting his property and effects, and it appeared to the judge from the examination that plaintiff had made away with his property, particularly a certain horse, a quantity of hay, and his books of account and other debts, in order to defeat or defraud his creditors, &c. If we can look at this averment, to help the order of committal, it supplies some additional matter.

The order itself states that plaintiff did not make satisfactory answer respecting his property and his transactions respecting the same, and did not produce his books as required in the order for examination.

As already intimated, I think he could be properly required to produce on the 4th section, and if the proceeding were wholly thereunder, I think an order adjudicating that he had not made satisfactory answers touching his estate and effects, and did not produce his books of account after being required so to do, would be sufficient.

I do not feel warranted in holding this order void because it might be presumed, on a close verbal criticism of the words used, that the non-production of the books was only a default on the garnishment branch of the order. On the principle of *Bullen v. Moodie*, I think we may assume that the judge acted on that part of the proceeding which

was within his jurisdiction, unless it appeared clearly the other way.

In a case of *Davidson v. Gordon* (5 U. C. L. J. 279) the late Mr. Justice Burns ordered a *ca. sa.* to issue against a debtor, who was ordered to be examined as to his debts, and to produce all papers and writings, &c. He refused to produce certain promissory notes. The judge says, "The notes were papers and writings respecting the debt." He cites the 41st section and states that it allows imprisonment or a *ca. sa.* to be awarded; that if the notes had been produced they might be seized by the sheriff as securities belonging to the debtor.

I think, though not without some hesitation and much consideration, that the order of commitment may, on the pleadings, be upheld.

GWYNNE, J.—I confess that during the argument I entertained the impression that under the 41st section of Consol. Stat. 22 Vic. ch. 24, it was not competent for the judge to make an order which would have the effect of bringing the judgment debtor out of the county in which he resides for examination touching his estate and effects and his dealings therewith; but I am now satisfied that such impression was formed without sufficient consideration.

I have now little doubt that the framer of the Act for abolishing arrest in civil actions, 22 Vic. ch. 96, from the 13th section of which Act the 41st section of the Consolidated Statute 22 Vic. ch. 24 is taken, was of opinion that this 13th section, notwithstanding the generality of its terms, only applied to proceedings in cases in the Superior Courts and before the judges of these courts; for by the 17th section he expressly provided that every section of the Act, including the 13th, designating them by their respective numbers (excluding the 10th, which had already specially given to County Court judges jurisdiction to order arrest of persons upon process to issue out of a Superior Court) should extend and apply to and be in force in the several County Courts in Upper Canada, and actions and

proceedings therein respectively, as shall also the rules and forms, to be made as mentioned in the 16th section of this act, subject to the modifications expressed in the second section of the County Courts Procedure Act of 1856. Now, the modifications thus referred to are as follows, "All the powers under the said sections, exerciseable by the Court of Queen's Bench or the Court of Common Pleas or by any one of the judges thereof, shall and may in like manner be exercisable by the judges of the County Courts respectively in term or vacation, as the case may require, as to matters and proceedings therein within the jurisdiction of the said County Courts respectively, and also subject to such other modifications as may be necessary to give full and beneficial effect to the said several sections in their extension and application to the County Courts, and all actions and proceedings within the jurisdiction of the same Courts respectively.

Now, I apprehend, there can be no doubt that a judge of the Superior Court, in a Superior Court case, *had* under sec. 13 of 22 Vic. ch. 96, and *has* under the 41st section of the Consolidated Statute ch. 24, *jurisdiction* to order the judgment debtor to be examined before the clerk of the Crown of either of the Superior Courts at Toronto, or before any other person to be named in such rule or order, without regard to the county in which the debtor should reside, if the judge should think fit to exercise his jurisdiction in that manner; "*or* before the judge or clerk of the County Court within the jurisdiction of which such debtor shall reside;" but these latter words were not introduced for the purpose of limiting the jurisdiction as to examinations to the County within which the debtor resides. The jurisdiction as to commitment, but not as to examination, is limited to the county where the debtor resides, as appears by the 9th section of ch. 33 of the Act of 1859, extending the provision of the Act for abolishment of imprisonment for debt.

Now, if a Superior Court Judge, in a Superior Court case, could order an examination of the debtor before the Clerk

of the Crown at Toronto, although the debtor should reside in an outer county, I do not see why a County Court Judge, in whose court the judgment is obtained, should not have the power, in order "to give full and beneficial effect to the several sections of the Act, in their extension and application to the County Courts, in all actions within the jurisdiction of the same courts respectively," to examine the debtor himself in the county where the judgment is under an order issued for that purpose. This would seem to be the mode in which "the powers exercisable by the Superior Court Judges shall and may in like manner be exercisable by the Judges of the County Courts as to matters and proceedings within the jurisdiction of such County Courts respectively," and is analogous to the provisions of the 17th section of the County Courts Act of 1856.

The consolidators of the statute, instead of adopting the plan of the framer of 22 Vic. ch. 96, when consolidating that statute, introduced into the *several sections*, where requisite, words applying the provisions of the several sections to the County Courts and the judges thereof, and left out wholly the 17th sec. of 22 Vic. ch. 96. They appear also to have been of opinion that the 13th section, consolidated in the 41st sec. of 22 Vic. ch. 24, required no words to be introduced into it to make it applicable to the County Courts. The law, therefore, as it now stands, authorizes any person who has obtained a judgment in *any* court, and therefore in *a County Court*, "to apply to a judge, having authority to dispose of matters arising in such court, for a rule or order that the judgment debtor shall be orally examined upon oath before "the clerk of the crown, or before any other person to be named in such rule or order." Under these words I think we are justified in holding that the judge of the County Court, where the judgment is, may order the examination to take place before himself within his own county, although the debtor may reside in an adjoining county, and that such a decision is quite in conformity with, and analogous to, the jurisdiction by this same section conferred on Superior Court

judges in Superior Court cases, and to the jurisdiction conferred on the judges of County Courts by the County Courts Act. Moreover, I am of opinion that, if the *letter* of the Act at all justifies this construction, we ought to give it, in a case like this, where the party complaining, having submitted himself to the examination, and having been adjudicated to have been guilty of conduct subjecting him to imprisonment, if the proceeding was regular, now rests his cause of action on a point so purely technical and devoid of merits: the jurisdiction exercised by the Judge of the County Court is to be upheld, if consistently with a reasonable construction of the Act it can be, and in my opinion it can.

As to the other point, I concur also in the opinion of the Chief Justice, that we should not *assume* that the order of commitment proceeded upon any thing arising out of the order for examination under the garnishment clauses, for the purpose of invalidating the order, more especially when we find in the order such abundant ground stated for sustaining it under the 41st sec. of ch. 24.

It is to be desired that hereafter the judges of the County Courts will follow the practice of the Superior Courts in requiring these examinations to be taken under separate orders.

I concur that judgment should be for the defendants on the demurrers.

GALT, J., concurred.

Judgment for defendants on demurrer.

BRUCE V. GORE DISTRICT MUTUAL ASSURANCE CO.

Fire policy—Double insurance—Absence of notice and assent.

Besides the provision of C. S. U. C. ch. 52, sec. 28, one of the conditions indorsed on a policy, issued to plaintiff by defendants, a Mutual Insurance Co., was that, in case of insurance effected with other companies, notice must be given to defendants and their approval indorsed on the policy, and the passing of a resolution avoiding the policy, and mailing a copy addressed to the assured, should avoid the same. After the issue of the policy in question to plaintiff, he applied to another company for a further insurance, and received from the local agent an interim receipt, by which, it appeared in evidence, the company considered themselves bound until they should repudiate the risk, which in this case they did not do until after the occurrence, though in ignorance, of the fire, their liability for plaintiff's claim, made for loss sustained by which, it appeared they had not yet decided as to. No notice was given to defendants of this further assurance until they received from plaintiff his statement and affidavit after the fire, when he swore to the existence of it, upon the second day after the receipt of which defendants mailed to him a copy of their resolution avoiding his policy:

Held, that plaintiff having effected an insurance with another company, which from all that appeared from the evidence was binding upon that company, and having failed to notify defendants thereof, defendants were not liable under their policy, which they had the right to avoid even after the occurrence of the fire.

* **DECLARATION** on a fire policy, dated 2nd April, 1867.

Plea, setting out the statute (U. C. Consol. ch. 52) enacting, "If insurance on any house, &c., subsists in the company and in any other office at the same time, the insurance in the company shall be voidable, at the option or in the discretion of the directors, unless the double insurance subsists with the consent of the directors endorsed, &c.; that one of the conditions of insurance on plaintiff's policy was, that insurances, subsisting or effected with other companies, must be notified, and, if approved, endorsed, &c., and that the passing of a resolution by the board avoiding the policy on any of the grounds on which they had the option to avoid the same, and the mailing of a copy addressed to the assured, &c., should thenceforward make the policy void; that after they issued this policy to plaintiff, and while it was in force, he effected a further assurance on the property, with the Waterloo County Mutual Company, for \$1000; that he did not notify defendants thereof; that defendants

never consented thereto, nor was any consent of theirs endorsed; that on the last mentioned insurance coming to their knowledge a meeting of the board was duly called and a resolution passed avoiding said policy on account of the second insurance, and they notified plaintiff by mailing copy of the resolution, &c., whereby it became void.

Issue.

The trial took place at Walkerton, before Hagarty, C. J.

The fire occurred May 6th.

The policy was produced: no consent was endorsed upon it.

The company's secretary proved that they received notice of the fire on the 12th May; that a meeting was held on the 25th May, and a resolution was passed avoiding the policy in consequence of the discovery of a second insurance, and on 28th May a copy of this was mailed to plaintiff; that the company never heard of the second insurance till after the fire.

The agent of the Waterloo County Company produced plaintiff's application for insurance, 2nd April, 1869, for \$1000, on the same stock of goods, for three years from that day. On the same day plaintiff gave his premium note for \$100 thereon, and the agent gave him an interim receipt, also produced. He told the agent he had \$1000 in defendants' company. The interim receipts were generally for 60 days. The agent forwarded the application, &c., to the head office and never heard of any repudiation by them till after the fire. He had no power to issue policies, but was in the habit of sending all to the head office. The company considered themselves bound in the interval until they repudiated. He had a book of instructions (not produced) not under seal, and could bind them in the interval.

The secretary of the Waterloo company also proved that the local agent could give interim receipts, and said the company admitted themselves bound by interim receipts, if everything was right; that they received plaintiff's application from the local agent, and after having had it a couple of weeks declined it on the 7th May, not knowing then of

the fire, and the next day after declining they heard of the fire; that plaintiff applied to them to pay the loss, but the directors had not yet decided as to their liability; they had asked him to produce certain invoices.

Plaintiff sent in to them a statement of his loss, with an affidavit verifying same, sworn 26th May, 1869. He also furnished statement of claim and his affidavit to the defendants of same date. After stating his loss he swore that he had effected an insurance of \$1000 with the Waterloo County Company, and that he had paid the agent the portion of premium demanded by him.

A verdict was taken by consent for plaintiff, with leave to defendants to move to enter a verdict for them, or nonsuit.

In Michaelmas Term last *J. B. Read* obtained a rule on the leave reserved, to which during this Term *Harrison*, Q. C., shewed cause, citing *Linford v. Provincial Insurance Co.*, 11 L. T. N. S. 330; *Dafoe v. Johnstown District Insurance Co.*, 7 C. P. 55; *Hatton v. Beacon Insurance Co.*, 16 U. C. 316; *Chapman v. Edwards*, 1 M. & W. 231.

Durand (of Galt) contra, cited *Worseley v. Wood*, 6 T. R. 710; *Langel v. Mutual Insurance Co. of Prescott*, 17 U. C. 524.

HAGARTY, C. J., delivered the judgement of the court.

We do not see how it is possible for plaintiff to deny the existence of an insurance with the Waterloo Company: he has sworn to its existence and has made formal claim and proof therefor.

Their officers, when produced in court, do not deny the right of their local agent to bind them for a time by these interim receipts, and the time usual in such receipts, viz., sixty days, had not elapsed when the fire took place, and certainly no repudiation by them was attempted till after the fire, nor do they at the trial say they had decided to resist plaintiff's claim.

For all that appears to us on the evidence, the claim was binding on the Waterloo Company. Equity would, it is

assumed, compel the issue by them of a formal policy, or possibly entertain and decide the whole claim on the existing evidence.

If there were any doubt as to the existence of such an insurance it was for plaintiff to clear it up by delaying the trial of the present suit till the issue of his claim on the Waterloo Company ; or, at least, he should not in the same breath swear to its existence and send in his proofs therefor, and ask us to assume its non-existence.

Then, as to defendants' position. They seem clearly allowed to avoid a policy if there be another insurance not notified or assented to by them, and sec. 29 of the Consol. Act (see amended Act 27-28 Vic. ch. 38) allows them two weeks after receipt of the written notice of another insurance to assent thereto. If dissent be not declared within such time they shall be deemed to have assented.

Here they never heard of the other insurance till after the fire. On 12th May they heard of the fire on the evening of 6th May. It does not appear that any written notice of the other insurance was given to them except the statement contained in plaintiff's proofs and affidavit, dated 26th May. On the 28th the copy of the resolution avoiding the policy was mailed to plaintiff. This would seem to fall within the fortnight allowed by the statute.

It was urged to us that the defendants could not avoid the policy after the loss had occurred. We do not see how this can affect the rights allowed them by the statute and the conditions endorsed on the policy.

The effect of such a position would be that if plaintiff could succeed in concealing the existence of the other insurance till after the loss, the defendants would lose all the legal protection expressly provided for them ; or if, as in the present case, both insurances were effected on the same day, each unknown to the other underwriters, and the property should be all destroyed the following night, all these provisions would be eluded.

Hatton v. Beacon Insurance Company (16 U. C. 316) expressly recognizes the interim receipt [as evidencing

another insurance. *Dafoe v. Johnstown Mutual Insurance Company* (7 C. P. 55) may also be referred to.

Rule absolute to enter nonsuit.

NEFF V. THOMPSON.

Dower—Adultery.

Held, adhering to *Woolsey v. Finch*, *ante* p. 132, that it is the voluntary living apart from the husband in adultery that creates the bar of dower, irrespective of the question as to how or why the separation came about.

DECLARATION in dower, as widow of Daniel Neff.

Plea, that demandant, in lifetime of husband, voluntarily and of her own accord, left her husband and from thence thereafter lived away from him voluntarily and of her own accord, and during coverture, &c., and without his license, lived away from him in adultery with one Edward Ward, without reconciliation, &c.

Issue.

At the trial, before Richards, C. J., at Welland, it appeared that while demandant and her husband lived together there was trouble between them about a man named Steele, but nothing clearly proving adultery was shewn. Her husband, it would appear, then went away to another township and she and her children remained with Steele on the farm. Nothing positive was shewn as to the movements of either her or her husband after this. They never, however, seemed to have lived together, and neither to have sought nor avoided each other. It was pretty clearly shewn that she lived in adultery and had a child or children by Edward Ward.

The learned Chief Justice held, on the authority of *Graham v. Law*, 6 C. P. 310, that the plea was not proved; in fact, that as she had not eloped from her husband, but

he had deserted her, the dower was not forfeited under the Statute of Westminster.

The demandant had a verdict.

In Michaelmas Term, *James A. Miller* obtained a rule to set aside the verdict for misdirection, to which *Harrison*, Q. C., shewed cause.

Miller supported his rule.

The authorities cited in *Woolsey v. Finch*, *ante* p. 132, were referred to and commented upon.

HAGARTY, C. J., delivered the judgment of the court.

Last term the case of *Woolsey v. Finch* (a) was decided by this court on a state of facts not easily distinguishable from the present case. It is there said, after reviewing *Graham v. Law*, and *Woodward v. Dowse* (10 C. B. N. S. 722), "His compelling her to leave by his violence, or her leaving in consequence thereof, or his abandoning her without provision, alike fail to warrant or excuse her subsequent voluntary living in adultery. The distinction in any of these cases would be too thin to admit the application of a different rule of law to each."

In *Hetherington v. Graham* (6 Bing. 135) the husband and wife had separated by mutual consent, yet her subsequent adultery was held a bar to her dower.

Lord Coke saith, "*Si sponte reliquerit et abierit, et moretur cum adultero*," &c., "Albeit the words of this branch be in the conjunctive, yet if the woman be taken away not *sponte*, but against her will, and after consent and remain with the adulterer, &c., she shall lose her dower." See also the rest of his commentary in *Woodward v. Dowse*. The willingly remaining in adultery seems to be true test, not the manner of the going away.

It appears to me idle to attempt to draw a substantial distinction between the going away because the husband threatened violence or actually drove her away by violence,

(a) *Ante* p. 132.

or in consequence of a quarrel the husband moved away to a place some miles distant.

The evidence of the manner in which this demandant and her husband ceased to live together, and the cause, is very indistinct. The subsequent adultery is proved with reasonable clearness.

We think there must be a new trial without costs. The evidence was, in our judgment, sufficient, if believed, to prove the plea.

The plea speaks of a voluntary leaving, but that is said, in the case cited, not to be of the substance of the bar of dower.

Rule absolute for new trial, without costs.

SMITH V. CLUNAS ET AL.

Boundary lines—Evidence.

Held, that the entries in the diary of the surveyor, together with a small piece of map, also produced, supposed to be his, (which was all that remained in the Crown Lands office shewing the lines in question run), and the trace of a blaze for a great part of the way, were evidence of the fact of the lines having been run by him in the manner in which he was directed to run them by his instructions (which were produced), although there was no further evidence upon the ground that the original lines had been run.

THIS was an action of ejectment, brought to recover possession of that part of lot number 9, in the 2nd concession from the Thames, as reckoned from the eastern boundary in the township of Howard, in the county of Kent, commencing on the concession line in rear of the said lot, at the south-easterly corner thereof, thence north, 45° west, along the side line, between lots numbers 9 and 10 in the said concession, 32 chains and 50 links; thence south, 45° west to the side line between lots numbers 8 and 9 in the said concession; thence south, 45° east to the said concession road; thence along said concession road to the place of beginning.

The plaintiffs claimed title, at the trial, before Hagarty, C. J., at Chatham, under Letters Patent, issued to William Smith Durie, dated the 27th July, 1841, and the defendants under the description contained in Letters Patent, issued to Timothy Desmond, dated 8th January, 1807.

The question turned upon the point where the northern or front boundary of the lot was. According to the contention of the plaintiff it was upon a concession line which, as he contended, was laid down in the original survey in continuation of a concession line which was run out and used from lots 1 to 7 and from lot 12 to the extremity of the township.

The defendant contended that there was no such concession line ever run in the original survey across lots 7 to 11, and that the north boundary of the lot in dispute must be ascertained by reference to letters patent only, and that by reference to letters patent it was placed some chains south of where the plaintiff contended it was.

The evidence given at the trial is fully stated in the judgment.

A verdict was taken for the plaintiff, with leave to defendants to move to enter a nonsuit or a verdict for them, if the court, who had power to draw inferences as a jury, should be of opinion upon the evidence, documentary and oral, that the plaintiff was not entitled to recover the power given to the court of drawing inferences, not, however, to prejudice the right of either party to appeal.

In Michaelmas Term last, *Becher*, Q. C., obtained a rule accordingly.

C. Robinson, Q. C., shewed cause. He cited *Llewellyn v. Earl of Jersey*, 11 M. & W. 183; *Horne v. Munroe*, 7 C. P. 433; *Shep. Touch*, 248.

Becher, contra, cited *Henderson v. Harris*, 10 C. P. 376; *Jamieson v. McCollum*, 18 U. C. 454; *Dunn v. Turner*, 3 C. P. 104.

GWYNNE, J., delivered the judgment of the court.

The original instructions from the Surveyor General's Department, for the survey of the portion of the township of Howard in question, were given to Mr. Abraham Iredell, Deputy Surveyor, by letters from Acting Surveyor General D. W. Smith, dated 14th November, 1795, and 14th January, 1796. The letter of the 14th November, 1795, was not produced, but that of the 14th January, 1796, was. In this the Acting Surveyor General says: "On referring to my letter of the 14th November I find you are directed to produce the surveys in your district from the north boundary of Howard, nearly parallel to the Thames and Lake St. Clair, to the east boundary of Sandwich, running *three* concessions in each township, and so much of their side lines as may be necessary to prevent confusion; or, in other words, you were directed to run three concessions in Howard, Raleigh, Tilbury, Rochester, and Maidstone, these townships fronting on the river Thames and Lake St. Clair.

"The general course of the river has been collected from Mr. McNiff's reports, as you will perceive by the papers which accompany this, as per schedule —. Neither the courses of the side lines nor of the concessions can be altered, *nor must any lot under assignment, by which the faith of the Government is pledged for 200 acres, be curtailed of that quantity on the survey.*

"*To effect this* observe the following rule: Previous to your going into the field examine your plans, having the courses of the river; but if you have any reason to believe they are inaccurate, you must take the curvature of the waters yourself, as indispensably necessary to prevent confusion.

"The side lines having been determined on from the general course of the river, protract them on your plan, having the course of the waters, and produce them, from the stations which divide the lots on the bank of the river, at right angles to the general course of the river, which must be north-west and south-east, as already established

for that river and not to be altered. *This done, draw a concession line across the township at right angles to the side lines (this on the Thames has been settled to be north-west and south-east and must remain so), so as to let it be a tangent to that curve of the river which breaks most in upon the townships, taking care that it does not intersect any part of the river: The intersection which this tangent makes with the nearest side line to the point of contact on the river will give your first and primary station to commence and regulate the whole of your work by, and from hence you must give the distances of the concessions, the tangent being the base or magistral line of the township.*

“It may not, indeed, be always necessary to run up from the first station in the same direction through the township; but, having established the second station, it may be better to run, either to the right or left, along the 2nd concession line to the side boundary of the township, and finish the concession on that line. When it so happens that the curves of the river bend from the magistral line outwards, and of course from the body of the township, and thereby leave space for two lots or upwards between the magistral line and the river, one or more lots may be taken off from, and adjoining without, the base line, by running short and broken concessions between the bends of the river, leaving any overplus land (not being a full lot) attached to the lot nearest the river; these broken or water concessions being called broken fronts and denominated A, B, C, &c.; *the first main or tangent concession, commencing on and within the base line*, as being the first space where the township finds its full breadth. I enclose a sketch elucidatory of this instruction.”

The survey, thus directed to be undertaken, did not appear to have reached the township of Howard until the month of January, 1799. Mr. Iredell's diary, commencing on the 1st January and ending on the 30th June, 1799, has been furnished from the Crown Lands office. From it it appeared that Mr. Iredell, on January 1st, 1799, commenced running the concession lines, in the township of Harwich,

from the reserve near Chatham, to the township of Howard. His daily employment was entered in this diary. On the 8th, 9th, 10th and 11th it was entered thus, "Ran one line in Howard. 12th—Rain and heavy storm. 13th—Ditto. 14th—Ditto, and finding the swamps overflowed with water. 15th—Returned to Chatham." The diary then shewed how he was occupied daily until the 11th February, when, frost having come again, he was employed on the 12th and 13th in collecting a party. 14th—Set out to finish the concession lines in Howard. 15th and 16th—Running a concession line from number 12 in Howard to Harwich and the broken front of number 1 in Howard and numbers 24 and 23 in Harwich. 17th, 18th and 19th—Running the 2nd concession line in Howard, the swamps would not bear.

Mr. Iredell's report and plans of this survey, and all record thereof, appear to have been lost, and nothing to shew his work upon the ground in the township of Howard remain in the Crown Lands Department except the above diary and a part of a map, which was produced, as being supposed to be part of Iredell's map, and which shewed this part of the township of Howard, extending from lot number 4 to lot number 14, both inclusive, and shewing continuous concession lines, extending, nearest the river, from the western limit of lot number 4 across a side line, between lots numbers 6 and 7 to a side line, between lots numbers 12 and 13, at which point this concession line appeared to be a tangent to the southerly limit of the river, and the next concession line, parallel with the first, also extending from the western limit of lot number 4 in like manner across all the lots and the said side lines into lot number 14.

A map was also produced from the Registry Office, a copy of which was filed, being part of a plan of Howard, certified by Mr. Papineau, as Commissioner of Crown Lands, in 1846, and filed in the Registry Office, Kent.

This map shewed the tangent to the river, spoken of in the instructions to Iredell, from the eastern limit of the township across the side line between lots 13 and 12 to

the limit between lots 11 and 10, where it stopped, and was taken up again at the side line between lots numbers 6 and 7 and continued to the township of Harwich. This map, also, shewed the next concession line south of the river, commencing at the eastern limit of the township parallel with the tangent line across the lots and the side line between lots 13 and 12 to the limit between lots 11 and 10, where it also stopped, and was taken up again at the side line between lots 6 and 7 to the westerly limit of the township at the town line of Harwich. A copy was produced; from the Crown Lands office, of a part of a plan made of part of Howard, by Mr. O'Mara, P.L.S., but no evidence was given as to the time when or the purpose for which or the instructions or data upon which this plan was prepared. It appeared by the evidence of one Macdonald that about twenty years ago a surveyor, named O'Mara, made a survey of this part of Howard, but upon what instructions or for what purpose did not appear. The map furnished to the Registry Office corresponded with that produced as a copy of O'Mara's plan, so that it may be inferred that his survey was before the plan was furnished to the Registry Office. The effect of O'Mara's plan, and of that furnished to the Registry Office, if they be held to govern, as the defendant contends they are, is, in one view of plaintiff's contention, to give no concession line whatever across lots 7 and 8, 9 and 10, in the two concessions south of the river, nor any substitute therefor, and to make all these last-mentioned lots be of varying depths, governed by the curvature of the river across them; the defendant's contention being that the boundaries of these lots are to be, and can only be, ascertained by measuring from the river the distances mentioned in certain letters patent for some of those lots which have been produced, the suggestion being that Iredell, in obedience to his instructions, which declared that *no lot* under assignment, by which the faith of the government is pledged for 200 acres, must be curtailed of that quantity, never laid down the concession lines between lots 6 and 13 upon the ground.

Now, that no motive of this kind could have operated, as a matter of fact, to prevent Iredell projecting the concession lines, seems to be apparent from these reasons: firstly, that it must be inferred that the government knew the lots, if any there were, in the township of Howard, under assignment, and by which the faith of the government was pledged for 200 acres, when they gave the instructions, and for the purpose of preventing the possibility of the survey affecting such lots, peremptory directions are given to Iredell to make the base or magistral line of the township a line drawn across the township on a certain course from the point where the tangent of the river, where it runs most into the township, shall intersect the first side line. Now, this tangent, as appears by all the plans, intersects the side line between lots 13 and 12, and accordingly, as is admitted, the tangent concession line was laid down by Iredell across lots 12 and 11, and it could not have been stopped there by Iredell for any reason without the most flagrant departure from the *main imperative direction in his instructions, which was to make this his base or magistral line*, if it could, as it appears it could, be projected across the township without intersecting the river; and, secondly, there does not appear in fact to be any reason for supposing that at the time the instructions of November, 1795, and January, 1796, were given, any of these lots, in any of the concessions affected, were pledged by the government to any one. Unless these lines were run continuously across these lots, there never has been laid down or reserved by the letters patent any allowance for road whatever, from 7 to 4 inclusive, in these concessions, or round these lots.

The earliest letters patent, the description of which has been produced, are those for lot number 8, in the 2nd concession, to Louis Bourdignon. The date of the issue of these letters patent is not stated, but the description for the letters patent would seem to be prepared in virtue of an "order of magistrates, 28th April, 1796," after the instructions had been given; and moreover, the continu-

ation of the concession line, from the side line between lots 13 and 12 to the side line between lots 7 and 6, would be quite consistent with these letters patent, and indeed necessary, in order to give it a concession line to front upon.

The description of lot number 8 in the 2nd concession of the township of Howard is: "Commencing where a post has been planted, *in front of the said concession*, at the north-east angle of the said lot; then south, 45° east, 67 chains, 40 links; then south, 45° west, 29 chains, 80 links; then north, 45° west, 67 chains, 40 links; then north, 45° east, 29 chains, 80 links."

The next letters patent, a copy of the description of which is produced, is for lot number 8 in the first concession of the township of Howard. When these letters patent were issued does not appear, but they were prepared in pursuance of an "order in Council, by Commissioner's Report, Western District, No. 11, in the year 1799." The description is, "Commencing where a post has been planted in front of the said concession, at the north-east angle of the said lot, upon the river Thames; then south, 45° east, 68 chains, 40 links; then south, 45° west, 29 chains, 80 links; then north, 45° west, 68 chains, 40 links, may the distance be more or less, to the river Thames; then north, 45° east, nearly along the edge of the river, to the place of beginning, containing 200 acres more or less."

The next letters patent issued, a copy of the description contained in which has been produced, were issued in 1803 to Timothy Desmond, granting him lot number 9, in the first concession of the township of Howard, by the following description: "Commencing in front of the said concession, at the north-east angle of the said lot, upon the river Thames; then south 45° east, 68 chains, 40 links; then south, 45° west, 29 chains, 80 links; then north, 45° west, 68 chains, 40 links, may the distance be more or less, to the river Thames; then north, easterly along the water's edge against the stream, to the place of beginning, containing 200 acres more or less, *with allowance for road*."

The only other letters patent produced or referred to

are those under which the defendants claim, dated 28th January, 1807, granting to Timothy Desmond the front half of the lot in dispute, under the designation of the "front half of lot number 9, in the third concession of Howard, by the following description, "Commencing, in the rear of the land located by Barbeal Parral, at the northerly angle of the said tract number 9, in the third concession; then south 45° east, 34 chains; then south 45° west, 30 chains, more or less, to the limit between lots numbers 9 & 8; then north, 45° west, 34 chains, more or less, to the land located by Barbeal Parral; then north, 45° east, 30 chains, more or less, to the place of beginning, containing one hundred acres more or less."

Now, no evidence is offered to shew by what description any land was located by Barbeal Parral. Whatever it was, if any, must have been in the 2nd concession; for what is granted to Desmond is the front half of lot 9 in the 3rd concession, commencing at the northerly angle of that lot, and lying in rear of land said to have been located by Parral, which must, therefore, have been on lot 9 in the 2nd concession. From all these letters patent, so issued prior to the letters patent to William Smith Durie, in 1841, it appears that the 1st concession is the concession fronting on the river; the 2nd concession is a concession fronting on a concession line in rear of the 1st; and the 3rd concession is the concession next in rear of the 2nd and corresponding with the 2nd concession, reckoned from the eastern boundary of the township mentioned in the letters patent to William Smith Durie; so that the lot number 9 in the 3rd concession, the front of which was granted to Timothy Desmond by the letters patent, issued in January, 1807, is identical with the lot number 9 in the 2nd concession from the river Thames, as reckoned from the eastern boundary, the rear part of which was granted to William Smith Durie by the letters patent of July, 1841. It is, also, apparent that when the government issued the first letters patent, namely, for lot 8 in the 2nd concession, they contemplated granting that lot *as fronting on a concession line constituting its northern boun-*

dary, and that such concession line constituted the rear and southern boundary of lot number 8 in the 1st concession. We must infer, also, that such concession line was a line pursuing one continuous course, as directed to be laid down by the instructions given to Mr. Iredell, not, as the defendants contend, a concession line, if there be any at all, which does not appear to be provided for by any of the letters patent, starting from the side line between lots numbers 13 and 12, and pursuing a course at right angles with such side line across lots 12 and 11, then deviating at right angles southerly along the limit between lots 11 and 10, *where there is no allowance for any road*, some chains; thence, at right angles with such last mentioned limit, across lots 10 and 9; thence again, at right angles, southerly along the limit between lots 9 and 8, *where there is no allowance for any road*, some chains; thence, at right angles with such last mentioned limit, across lot 8; thence, at right angles, northerly along the limit between lots 8 and 7, *where there is no allowance for any road*, some chains; thence again at right angles to the last mentioned line, across lot number 7, to the side line between lots 7 and 6, at a point south of the point where a continuous straight line, drawn from the point of departure on the line between lots 13 and 12, crosses between lots number 6 and the other lots in the 1st and 2nd concessions, respectively, to the extreme westerly end of the township.

Now, the evidence contained in Iredell's diary shews that on the 15th and 16th February, 1799, he ran a concession line from number 12 in Howard to Harwich, and on the 17th, 18th and 19th, he was running the 2nd concession line in Howard when the swamps would not bear. The piece of map which has been produced as his shews a line run from the side line between lots 13 and 12, in continuation of a tangent to the south bank of the river continuously across the township to Harwich. Such a line precisely corresponds with that line which, by his instructions, he was peremptorily directed to make the base or magistral line of the survey of the township. His instructions were

fined to making a survey of three concessions measuring from the river. His diary and the piece of map, produced as his, shew that he did lay out these three concessions. If he did not make this survey upon the base line, upon which he was directed to make it, he made it upon no base line. The map, which has been furnished from the Crown Lands Department to the Registry Office, shews this base line, extending from the eastern limit of the township, across the side line between lots 13 and 12 to the limit between lots 11 and 10, and no reason is given why it should stop there. It also shews the same line continued, taken up again at the side line between lots 7 and 6, and continued to the western limit of the township. Now, although at this distance of time it may be impossible to discover upon the ground any monumental posts clearly attributable to a survey so remote, I am clearly of opinion that we must infer that Iredell did run the concession line, as his diary states, and the piece of map produced as his, shews, and that it was a continuous straight line constituting the base line directed to be laid down by his instructions, and *the* concession line in front of the 2nd concession, and *upon which* the front of lot number 8 in the 2nd concession abutted, as granted by the letters patent firstly above mentioned. This being so, it is unnecessary to enquire what would be the effect of subsequently issued letters patent describing the side lines of lots in the 1st concession of a length which would cross such concession line. It is clear that lot number 8 in the 1st concession must stop at the concession line which is in front of the previously granted lot number 8 in the 2nd concession, whatever distance from the river that concession line may in fact be. Now, by the evidence of McDonald, a surveyor called by the defendants, it appears that by Iredell's map the distance from the river, along the line between lots 9 and 10 to the protracted concession line, as shewn by Iredell, would be 68 chains. The length given by the letters patent for lot 9 along that side line is 68 chains, 40 links, *with allowance* for road. Deducting, then,

the chain allowance for road would leave the distance by the letters patent to the concession line 67 chains, 40 links, whereas, it is said, Iredell's measurement would make it 68 chains, or only 60 links more than the letters patent indicated. Now, Hirman Malcolm, another surveyor, says that he measured this same line between 9 and 10 from the river, and he says that he does not think that Iredell's map correctly shews the curvature of the river. He says that, starting from a tree pointed out to him near the river, and running along the line between 9 and 10, a distance of 68 chains, 40 links, would take him 6 or 8 rods south of where the concession line, protracted from the tangent to the river, would strike the line between 9 and 10. Now, as the distance in the letters patent for lot 9 includes the concession line, his measurement would shew an error only of 50 links or 1 chain accordingly as the actual distance to the protracted concession line was 6 or 8 rods over the 68 chains, 40 links. However, he says that running along the line, starting from the usual height of the water in the river, for the distance of 68 chains and 40 links, would come *within* 40 links of the protracted straight concession line; so that, it would seem, by taking one starting point at the river, according to Malcolm's evidence, the protracted concession line would be from 69 chains, 40 links, to 68 chains 40 links, distant from the river, and according to another 68 chains and 80 links; whereas by the letters patent for lot number 9, which issued in 1803, it appears there was then well understood to be a concession line in rear of lot number 9 in the 1st concession on the river, which concession line constituted the front of the second concession, and the northerly limit of which was supposed to be distant from the river on the line, between lots numbers 9 and 10, 67 chains, 40 links. Now, this clearly establishes that at that time there was a concession line run which crossed lot number 9; and if so, it will necessarily follow that this must have been the line which Iredell ran, and which therefore is, as he has represented it to be, the tangent to the river pro-

jected across the township. Malcolm further says he saw a post, last spring, between lots 9 and 10, at the rear of the 1st concession: it was *nearly* 70 chains from the water's edge of the river: it stood about south of where the protracted concession line would strike. As to this post Mr. Otis Ingalls says it was not an original post, but that in 1852 *there was some dispute about where the original post had stood*, and one Samuel Smith pointed out the spot, and this post was then planted there as in the place where the original post had stood. Malcolm, as to the place, says that he is satisfied that a witness stump close by was a witness tree on the original survey. There were hacks in the stump grown over 50 or 60 years, too old to count the rings. A few days ago he says he went to the curve of the river, that is, on the tangent line, and he saw a trunk of a tree, which he took to be Iredell's tree. He ran south west from it across 12, 11, 10 and 9 and found a distinct, clear blaze right across, *that is, to the point of commencement of the description of the land granted by the firstly issued letters patent*. This, he says, was a very ancient blaze. There was an old oak tree, which had rotted, still bearing the blaze. The blaze went through a marsh. He also found a very ancient post lying on the ground between 10 and 11. He found no post between 8 and 9. The blazed line was most distinct and was a straight line from the tangent. William Cull was with Malcolm and pointed out the post to him between 9 and 10 in the 1st concession in the rear. There was an oak stump near by with three hacks on it, which had been much grown over. It had begun to decay: it was like a witness tree. He was with Malcolm when he traced the blazed line. The marks were plain on the trees. It looked like an ancient blaze. He did not go across lot 8. The blaze was quite plain to trace across 12, 11, 10 and 9; and he says that before O'Mara's survey he found a blaze along the 2nd concession line, across 7, 8, 9 and 10. It seemed an old blaze *then*. The line was chopped out along these blazes 12 or 13 years ago. Macdonald says that after 70 years it would be

impossible to find an original post. It might be found after 40 years: he did not search for blazes across 9 and 10 in a line with the tangent. He saw some blazes across those lots, which he took to be about 11 years old. Now, upon this evidence, I think, at this distance of time, the undoubted inference to be drawn is, that Iredell did pursue his instructions, and did, in obedience to them, lay out this tangent concession line in a continuous course across the township, which was and is the base and magistral line of this survey which he was ordered to lay down, and that he did also lay down, parallel with it, the 2nd concession line in one continuous course across the township, which concession line is that upon which the front half of this lot number 9, in the 3rd concession, or 2nd concession from the river, reckoning from the eastern boundary, abuts.

What is purported to be granted by the letters patent to William Smith Durie is "the *south parts* of lots numbers 8 and 9 in the 2nd concession from the river Thames, as reckoned by the eastern boundary, commencing on the limit between said lots numbers 8 and 9 and in the southern limit of lands granted to Louis Bourdignon *in the said lot number 8.*" Now, if letters patent had ever been granted to Louis Bourdignon for a part of the north or front part of lot number 8 in this concession, of which there is no evidence, the starting point of the description of the piece intended to be granted to William Smith Durie can be readily ascertained; but if no other land had ever been granted to Louis Bourdignon than that described in the letters patent above referred to, describing lot number 8, in the 2nd concession, then the person, who prepared the description for William Smith Durie's patent, has made a very bungling error, which may create difficulty in determining what is the land upon lot number 8, in the 2nd concession, reckoned by the eastern boundary which is conveyed by those letters patent. Such a bungling error, however, cannot alter the concession lines of a township, if they were laid out, or afford any evidence that they

were not. It is difficult to understand how any person, familiar with the duty of preparing descriptions for letters patent, could have supposed that a description of lot number 8, in the 2nd concession of a township, could cross over a concession line, wherever that line might be, into and cover part of lot number 8 in the 3rd concession; or that a line could be projected from the rear of one concession into the front of another without crossing a concession line; or should suppose that the description given in the letters patent for lot number 8, in the 2nd concession of this township, could convey to Bourdignon the north part of lot number 8, in the 3rd concession. The difficulty, however, which this loose mode of describing the starting point on lot number 8, of the land granted to William Smith Durie, does not affect the question as to lot number 9, with which we have to deal. The description of that portion of lot number 9, granted to him, commences at the concession line in rear of the lot, and as we are clearly of opinion that the front of this lot abuts on the concession line, as shewn upon all the maps, from the westerly limit of the township to lot 7, and from the easterly to lot 10, projecting it across from lot 11 to lot 6, the land owned by Timothy Desmond must be pushed north to that concession line, and the plaintiff will be entitled to recover for the southerly part of lot number 9, for the distance of 32 chains and 50 links from the southerly boundary line, if there shall be that distance left, after allowing to Desmond's front part 34 chains southerly from the front angle of the lot upon the concession line so as above determined. The case of *Wigle v. Stewart* (28 U. C. 427) accords with our judgment in this case. The verdict for the plaintiff will stand and the defendants' rule will be discharged.

Rule discharged.

JOHNSTON V. BARKER.

Assignment—Non-resident assignee—Sale of goods—Express or implied warranty—Liability for defect in title—New trial—Pleading.

Defendant, having been appointed by the proper authority official assignee in insolvency for a county in which he was non-resident, assuming to act as such assignee, sold the goods of the insolvent to plaintiff, who purchased on defendant's assertion that he had the right to sell, after full discussion between the parties as to this right, and plaintiff, having been satisfied by defendant's assertion, made in the honest belief that he had such right. The sale to plaintiff having been pronounced invalid, *Held*, that defendant's honest belief in his right to sell, as assignee, did not protect him from liability to plaintiff, if he warranted his title, nor was the knowledge on plaintiff's part of the possible defect in defendant's title fatal to the warranty on the sale of the goods.

Held, also, that had nothing occurred beyond the discussion of his title, and plaintiff had bought with this full knowledge, defendant would not have been liable; but, as it was clear that after full discussion of the supposed defect of title, defendant might have induced plaintiff to buy on express warranty, a new trial was granted to ascertain this fact:

The third count of plaintiff's declaration alleged that defendant, by falsely pretending and representing himself to be official assignee of the insolvent, and as such to have a lawful right and title to the goods then in his possession, and to sell and deliver same to plaintiff, induced plaintiff to buy same, and thereupon plaintiff paid defendant for same, whereas, in truth, defendant was not such assignee, and had no right to sell, whereby the goods were lost to plaintiff, and taken from him by process of law:

Held, a good count, as a count in case upon a breach of warranty.

This was an action against defendant for damages sustained by plaintiff in consequence of the invalidity of a sale of goods made to him by defendant, as official assignee for the county of Ontario.

The first count of the declaration charged that defendant, having in his possession the goods in question, as apparent owner thereof, in consideration that plaintiff would purchase same from him for \$1,353.65, promised plaintiff that he (defendant) had the right and title to sell and absolutely dispose of said goods. *Averment*, that plaintiff did buy at said sum and pay the money, but defendant disregarded his promise in this, that at time of promise and sale he had not lawful right and title to sell, &c., whereby the sheriff of the county of Ontario, under several writs of execution against the goods of one Cowan (the goods in question), demanded said goods from plaintiff,

and levied upon same as Cowan's goods, and plaintiff was obliged to give up, and did give up, said goods to said sheriff, and was put to, &c., great loss, &c., in defending same, and procuring a re-deliverance of same, &c.

The second count charged that defendant, warranting that he then had lawful right and title absolutely to sell and dispose of said goods, sold same to plaintiff; yet defendant had not then lawful right so to sell, &c., and plaintiff was afterwards obliged to deliver said goods up to the sheriff of Ontario, who took same, as goods of one Cowan, under execution, &c., &c., as in first count.

The third count charged that defendant, by falsely pretending and representing himself to be official assignee of the Insolvent Court of the county of Ontario, duly named and appointed under the act of 1864, for the purposes of said act, and in his capacity as such assignee to be duly seised and possessed of the estate of one Samuel Cowan, an insolvent in said county, and as such assignee to have lawful right, &c., to certain goods of said estate, and then in his (defendant's) possession, and to sell and deliver same to plaintiff as such assignee, induced plaintiff to buy same for a price which plaintiff paid defendant; whereas, at time of making said pretence and representation, defendant was not such official assignee, duly, &c., appointed, nor had he, as such, any lawful right, &c., to said goods, or to sell same, and after said sale and delivery by defendant to plaintiff same were seized by sheriff of Ontario, &c., &c., as in former counts.

Pleas (to first and second counts), *Non assumpsit*.

Second plea to first, second and third counts, that defendant had authority to sell and deliver said goods to plaintiff. To third count, not guilty.

The third count was also demurred to, on the ground that it was not founded on any promise or warranty of title; that no fraud by defendant was shewn, nor was there any allegation that defendant ever represented, as a matter of fact, what was true (*a*), knowing it to be untrue.

At the trial, before Hagarty, C. J., at the Fall Assizes at Whitby, in 1868, it appeared that defendant, a resident of the county of York, had been appointed an official assignee in insolvency for the county of Ontario. Cowan, a trader, living in Ontario, executed an assignment to defendant, as assignee, of his stock in trade, which was purchased in bulk by plaintiff from defendant, as such assignee. Before purchasing, plaintiff expressed some doubt as to defendant's right as assignee, and they talked of the matter and of his non-residence in the county. Defendant said he was perfectly satisfied on this, as he had consulted Judge Harrison, and that he had a good title as assignee; and it was on this basis and on these assurances that plaintiff purchased.

Executions issued against Cowan, which plaintiff resisted, and became a party to several interpleader suits, in all of which he failed, as defendant's title, as assignee, was held to be defective in consequence of his residence out of the county. Heavy costs were incurred by plaintiff, besides having to pay the executions, and he sought to recover all these, as damages, from defendant.

For the defendant it was objected that there was no evidence of express warranty in the first count, except a title as official assignee; that there was no implied warranty on sale of goods; that as to the counts in tort, unless representations untrue, to defendant's knowledge, no action lay; and that there was no evidence of warranty whatever.

Leave was reserved to defendant to move to enter a nonsuit on these grounds.

The jury were asked if, as a matter of fact, defendant promised or warranted that he had title, and which promise, &c., was the consideration on which plaintiff purchased, and on this they found for the plaintiff.

In Michaelmas term, 1868, *Duggan*, Q.C., obtained a rule on the leave reserved.

In Hilary term, 1869, both demurrer and rule were argued together, and were re-argued in Michaelmas term

last. *J. H. Cameron*, Q.C., appeared for the demurrer and shewed cause to the rule, citing *Morley v. Attenborough*, 3 Ex. 500, & 512, per Parke, B.; *Barry v. Croskey*, 2 J. & H. 1; *Cornish v. Abington*, 4 H. & N. 549; *Thorn v. Bigland*, 8 Ex. 725; *Money v. Jorden*, 15 Beav. 372; *Milne v. Marwood*, 15 C. B. 778.

Duggan, Q.C., contra, cited *Freeman v. Baker*, 5 B. & A. 797; *Allen v. Hopkins*, 13 M. & W. 94; B. & L. 3rd ed., 333, 414; *Addison on Torts*, 2nd ed., 745, 748; *Taylor v. Ashton*, 11 M. & W. 401; *Shrewsbury v. Blount*, 2 M. & G. 475; *Evans v. Collins*, 5 Q. B. 804; *Baguley v. Hawley*, L. R. 2 C. P. 625; *Chisholm v. Proudfoot*, 15 U. C. 203; *Childers v. Wooler*, 2 E. & E. 287.

HAGARTY, C. J.—It was admitted throughout that defendant had acted in good faith, fully believing he had legal title as assignee.

The proposition for consideration is this, a person, assuming to hold an official or representative position, does an act professing to pass the right to property in such character; and on his assertion, according to his honest belief, that he possesses such right, another person is induced to alter his position and purchase such property from him: the possible infirmity of title was discussed between the parties, but the purchaser was satisfied by the vendor's assertion of his legal right, and bought on the faith thereof; is the vendor liable for damages arising from the infirmity of his asserted title?

The question is of some difficulty.

Morley v. Attenborough (3 Ex. 500) would seem to decide that there is no implied warranty of title in the contract of sale of a personal chattel. There, the chattel had been sold by defendant, a pawnbroker, as an unredeemed pledge. Parke, B., says: "It appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it. By the statute law he gains no

better title by a pledge than the pawner had; and as the rule of the common law is, that there is no implied warranty from the mere contract of sale itself, we think that when it is to be implied from the nature of the trade carried on, the mode of carrying on the trade should be such as clearly to raise that inference. In this case we think it does not: the vender must be considered as selling merely the right to the pledge which he himself had."

It might be worth considering whether, if defendant, though professing to hold a pledge as a pawnbroker, and to sell it as such, did not really fill such a character, he would be liable. The language used would point to an affirmative answer.

Apart from the assumption of holding some authority in official character, it seems clear that defendant is not responsible for a false representation, unless made fraudulently.

Childers v. Wooler (2 El. & El. 306)—Cockburn, C. J.: "The count, which is for a false representation, is at once disposed of by *Collins v. Evans* (5 Q. B. 820, in Error) and the numerous other authorities which establish that, to support an action for false representation, the representation must not only have been false in fact, but must also have been made fraudulently."

The present case seems to me to resemble rather those in which a person does an act under an alleged authority or agency under or from another.

Collen v. Wright (7 E. & Bl. 301, confirmed in Error, 8 E. & Bl. 647).—Defendant had been agent and manager of property for A. B. The plaintiff, believing him still to have the management, and to be the general agent of A. B., rented a farm from him, belonging to A. B., by an agreement signed by defendant as such agent. It was admitted that defendant *bonâ fide* believed himself to have authority to make the agreement, but as a matter of fact he had not, and plaintiff was defeated in a Chancery suit against A. B. to enforce the agreement, and sought to recover damages from defendant for his costs and money laid out on the farm, on which he had entered under defendant's agree-

ment. Lord Campbell, C. J. : "There can be no doubt the defendant asserted he had authority to let the property on the terms to which he agreed. That is a promise and a warranty. Might he not, then, have been sued on the warranty, although he believed it to be true? If he induced the plaintiff to act upon it, he was bound." Wightman, J. : "If a man makes a contract as agent, he does promise that he is what he represents himself to be, and he must answer for any damage which directly results from confidence being given to the representation." Crompton, J. : "Here we have a written document in which defendant states himself to be agent. It never was doubted that an action would lie on such contract. I agree that an action for deceit would not lie, since there is no *mala fides* : all the cases agree as to that." In Error, Willes, J., gave judgment, concurred in by five other judges (Cockburn, C J., alone dissenting) : "I am of opinion that a person, who induces another to contract with him, as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare mis-statement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act, but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person, or alleviates the inconvenience or damage which he sustains. The obligation arising in such a case is well expressed by saying, that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise."

Sir A. Cockburn delivered an elaborate judgment, dis-

senting from the opinion of the other nine or ten judges. He says : "The implied contract which we are called upon to establish in this case, is a thing unknown to our law. * * * We are creating a new species of liability on a new contract, now for the first time to be implied as to a warranty of authority, which, if the party now to be charged had been required expressly to give, he would probably have refused."

Pollock, C. B., says in this case : "It will probably not be disputed that a representation is not actionable unless dishonestly made, or unless it be a warranty."

The Editor of the American edition of 8 E. & B., in his note, asserts the result of the American cases to be in accordance with the view of Cockburn, C. J. He says : "When the agent discloses his authority fully, and acts in good faith, or where his conduct has been the result of an honest mistake as to the extent of his powers, he is exonerated," citing *Sinclair v. Jackson* (8 Cowen, 585); *Ogden v. Raymond* (22 Connecticut, 384); *Inhabitants of Webster v. Larned* (6 Metcalf, 528).

Randall v. Trimen (18 C. B. 786), cited in *Collen v. Wright*, supports the same doctrine, Jervis, C. J., stating it emphatically, quoting the notes to *Thompson v. Davenport* (2 Sm. L. C., 4th ed. p. 30); as where an agent, not in fact having authority to contract, yet does so, honestly believing he has the power, as in the case of a forged process of attorney which he believes to be genuine.

Our Court of Common Pleas, in *Eckstein v. Whitehead* (10 C. P. 70) notices both these cases as settling the law.

It is now to be considered whether the defendant, not in reality filling the position of official assignee, but representing himself as such, can be in a better position than an agent professing to hold an authority from another, which authority does not exist. He has voluntarily, for his own profit, assumed to fill that official position, not being legally qualified therefor, and has affected to sell property to plaintiff, to the serious damage of the latter, who thereby acquired no legal right thereto.

His honest belief of his qualification will not protect him, if we apply to him the doctrine so broadly laid down by the court in *Collen v. Wright* and *Randall v. Trimen*. But, assuming his liability on the principle of the cases cited, it is urged with much force that the fatal defect in his title, as assignee, was as well known to plaintiff as to himself. On this point we may refer to *Smout v. Ilbery* (10 M. & W. 1). Alderson, B., referring to a statement by the agent, false in fact, but believed by him to be true: "It is a wrong, differing only in degree, but not in its essence, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient ground, that the statement will ultimately turn out to be correct; and if that wrong produces injury to a third person, *who is wholly ignorant of the grounds on which such belief of the supposed agent is founded*, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences." In all the cases in which an agent has been held, he says, "he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated, as true, what he did not know to be true, *omitting at the same time to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act.*"

That was the case of a wife contracting as agent for her absent husband. He died abroad, and plaintiff continued supplying goods to her as before, he and she being alike ignorant of his death. The judgment proceeds: "There is no ground for saying that, in representing her authority as continuing, she did any wrong whatever. There was no *mala fides* on her part, no want of due diligence in acquiring knowledge of the revocation, *no omission to state any fact within her knowledge relating to it*, and the revocation itself was by the act of God. The continuance of the life of the principal was under these circumstances

a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present, and to this conclusion we have come."

This view of the law might be urged to plaintiff's contention for an implied warranty, as the possible infirmity of the assignee's title was a matter equally known to both parties, and there was no omission by defendant of any information which, in Baron Alderson's words, "would enable him (the plaintiff), equally with himself, to judge as to the authority under which he proposed to act."

We have, therefore, to consider if this knowledge of the possible defect in defendant's authority to act is fatal to the implied warranty.

In one of the cases it was suggested that a man might honestly believe he was another man's agent under a forged power of attorney. There might be a rumour that a forgery had been committed, and this might be the subject of a discussion between him and an intending purchaser. The latter might ask, was the professed agent sure the process was genuine. The latter might say, yes, he was perfectly satisfied on that point; that he had consulted a person well acquainted with the principal's writing and he said it was all right. Would a sale made under these circumstances leave the professed agent liable to an action, as in *Collen v. Wright* and *Randall v. Trimen*? Or would the fact of the possible defect being the subject of discussion exonerate him? Does the discussion amount to anything more than an enquiry from defendant if he were certain of his occupying the position of assignee, and suggesting certain possible objections that might be made against it?

It is not easy to see how the warranty would cease to be implied, because, on the defect being suggested, he insists

that it was no defect, and that he had taken advice on it. The mentioning of the objection causes him more expressly to assert that he is, notwithstanding, duly clothed with the character of assignee.

Assignees in bankruptcy have to do many acts at their peril. Cases have occurred in which the superseding of the commission, or the non-existence of a good petitioning creditor's debt, or the want of a sufficient trading, or act of bankruptcy, may have nullified all these proceedings.

In *Re Bryant* (2 Rose, 18) the Chancellor says: "I have no authority to indemnify an assignee against the consequences of his situation, nor prevent his liability to the bankrupt in respect of the property disposed of under the commission, if it be superseded. He must, while assignee, consider the commission under which he derives his appointment a valid commission, act accordingly, or remove himself from that situation."

In *Ex p. Graves* (1 Glyn & J. 91) the Chancellor says: "The assignees' first duty is to satisfy themselves that the commission is well founded." If they contract to sell property they must make good title, like ordinary vendors: *McDonald v. Hanson* (12 Vesey, 277).

There is a large class of cases where money is sought to be recovered back when paid by mistake.

A distinction is always taken between mistake of fact and mistake of law. In the former case it may be recovered; in the latter it cannot. See a collection of the cases in the notes to *Marriott v. Hampton* (2 Sm. L. C. 375, ed. 1867).

Cripps v. Reade (6 T. R. 606) was a peculiar case. Defendant claimed a leasehold estate, as administrator of Mary Bartlet, who had taken out administration to her husband, the former owner, under the name of Caleb Bartlet, his real name being *Carey* Bartlet. On the sale, the lease was delivered to plaintiff, but there was no assignment or other conveyance, but a conversation took place between them, in which defendant said "that the premises were his right and property to do as he liked with, and if

anything happened he would see the plaintiff righted." Afterwards the nephew of C. B. took out administration by the right name, and recovered possession by ejectment against plaintiff, who then brought money had and received for the purchase money. Lord Kenyon, after distinguishing *Bree v. Holbeck* (Doug. 654), said: "Here the whole passed by parol, and it proceeded on a misapprehension by both parties that defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As therefore the money was paid under a mistake, I think that an action for money had and received will lie to recover it back."

In our case both parties acted on the mistaken belief that defendant was the lawful assignee in insolvency. Here the fatal defect was incapacity from non-residence; there it arose from a blunder in the grant of administration.

The distinction between a mistake in fact and in law, in either of the cases, is rather thin. But in our case the defect was known to both parties, but its legal consequence was equally unknown to both.

In many of the cases the money paid is recoverable, on the ground of a total failure of consideration, where nothing passed on the transaction on which the money is paid.

Kitchen v. Hawkins (L. R. 2 C. P. 22) was a case where a creditor accepted a deed of composition, believing, as did the other parties, that it was valid, and received some payments under it. It was afterwards held invalid in law, and the creditor was held bound by the composition, the only mistake being not of fact but of law.

In the present case the defendant Barker had, as a matter of fact, been appointed assignee by the proper authority, but his non-residence in the county disqualified him for the office. It was simply a mistake in law on both sides. He did not conceal the supposed infirmity; he discussed it with the plaintiff, who was fully aware of its existence. Had nothing occurred beyond this discussion of his title, and the plaintiff bought from him, as assignee, with this full knowledge, I think, on the principles of the

authorities cited, and especially of *Morley v. Attenborough*, no action, such as is stated in the special counts, could be maintained.

I think the plaintiff's claim must rest on the presence or absence of a warranty.

I think it clear that after a full discussion of the supposed defect of title, the defendant might have induced plaintiff to buy on an express warranty of title in himself. No particular form of words would be requisite, but something tantamount to a warranty or engagement as to title. It remains, therefore, to consider whether there was such a warranty in this case.

In *Stucley v. Baily* (1 H. & Colt. 405) Martin, B., says: "The best definition of a warranty is that given by Lord Abinger in *Chanter v. Hopkins* (4 M. & W. 399): "A warranty is an express or implied statement of something which the party undertakes shall be a part of a contract, and though part of the contract, yet collateral to the express object of it."

I have not thought it necessary to go over the class of cases on contracts for sale of real estate. The last case on the subject is *Engel v. Fitch* (L. R. 3 Q. B. 314), where all are reviewed.

On the whole, we have decided on granting a new trial, with costs to abide the event. The verdict must, we think, depend on whether there was or was not an express warranty of title.

GWYNNE, J.—I concur that there should be a new trial.

Upon the demurrer to the third count, I am of opinion that, if it must be treated as a count in case as for fraud or deceit, irrespective of any warranty, the count is bad. An action for deceit will not lie without *mala fides*; all the cases agree as to that: *Collen v. Wright* (7 El. & B. 314); but I think that the construction to be put upon the third count is, that it is a count such as used formerly be used in case for a breach of warranty before the action on the contract became general, and although the count

seems of little use in this declaration, coupled with the second count, which is framed upon an express warranty, we can only, upon this demurrer, pronounce whether the count be good or bad. Upon an express warranty, given on a sale, or where the contract of sale implies a warranty, the declaration may still be framed either upon the contract or the wrong: *Bullen & Leake*, 333.

The count alleges that the defendant, by falsely pretending and representing himself to be official assignee of the insolvent, and as such to have lawful right and title to the goods then in his possession, and to sell and deliver the same to the plaintiff, induced the plaintiff to buy the goods, and thereupon plaintiff paid defendant for the goods, whereas in truth the defendant was not such assignee, and had no right to sell the goods, whereby they were lost to the plaintiff and taken from him by process of law set out in the count. Now, a representation is a statement, affirmation, or assertion, made by one party to the other before or at the time of the contract, of some matter or circumstance relating to it. If the representation or statement was intended to be a substantial part of the contract it is to be regarded as a warranty: *Behn v. Burness* (9 Jur. N. S. 621).

Medina v. Stoughton (1 Salk. 210) was an action on the case, wherein it was held that where one, having possession of chattels, sells them, *affirming* them to be his own, that amounts to a warranty. In *Morley v. Attenborough* (3 Ex. 511) Parke, B., refers to this case as good law, and he cites the observations of Mr. Justice Buller in *Pasley v. Freeman*, disclaiming any distinction between the effect of an affirmation when the vendor is in possession or not, treating it as equivalent to a warranty in both cases. In *Adamson v. Jarvis* (4 Bing. at p. 73) Best, C. J., says: "If a man, having possession of property, which gives him the character of owner, *affirms* that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action. It has been said that is because there is a breach of *contract* to

rest the action on. This is not the true principle : it is this, he who affirms *what he does not know to be true*, or knows to be false, must answer in damages." In *Collen v. Wright* (7 El. & B.) Lord Campbell, C. J., says : " There can be no doubt that the *testator asserted* that he had authority to let the property on the terms to which he agreed : that is a promise and a warranty."

So this count, by alleging that the defendant, by *representing* or *affirming* himself to be entitled, &c., to sell, induced the plaintiff to buy, involves the allegation that the defendant, by warranting his title to sell, induced the plaintiff to buy. The count is therefore a good count as a count in case upon a breach of a warranty ; but to entitle the plaintiff to recover under it, he will have to prove a *warranty* to the same extent as it is necessary for him to do under the second count.

GALT, J., concurred.

*Rule absolute for new trial, costs to abide the event,
and judgment for plaintiff on demurrer.*

THOMPSON V. LEACH.

*Adhering to previous decision of same court, differently constituted, though
individually disapproving of same.*

Held, on demurrer to the plea in this case, as amended in accordance with the suggestion contained in the judgment of this court, as then constituted, (18 C. P. 141), by the additional averment *of notice to plaintiff of defendant's election to stop running the vessel, and that plaintiff did not pay or offer to pay the deficiency*, that, whatever might be the individual opinions of the *present* members of the court, and however inclined to take the opposite view, the plea so amended must nevertheless be held good, in accordance with the judgment previously pronounced, until the reversal of that judgment by a higher court.

THIS case was before the Court in Hilary Term, 1868, on demurrer to the second plea, and is reported in 18 C. P. 141.

That plea rested the defence on the fact that the earnings, during the time that defendant ran the boat, did not amount to \$75 per day, wherefore he discontinued running her.

Plaintiff's contention was that defendant was bound in any event to run her for the first period of six weeks.

The Court fully considered the contract, and in the judgment it is said: "The particular part of this agreement was not and is not an absolute engagement to run the boat during the whole period of six weeks, whatever the earnings might have been, but a qualified and conditional one which entitled the defendant to stop running whenever the earnings fell below \$75 per day * * * but that must be considered along with the right which the plaintiff had to pay up any deficiency in that respect, and to require the vessel to continue her running during the same period."

The Court also held that, "if defendant elected to stop he should have notified the plaintiff, that he might have elected whether he would require her to continue running, by his paying the deficiency."

In consequence of the want of averment of notice to plaintiff, the Court gave judgment against the plea, but allowed defendant to amend by supplying such averment, and that plaintiff did not pay or offer to pay.

This amendment was accordingly made, when plaintiff took issue on the amended plea and also demurred.

The second trial took place at the Spring Assizes, at Toronto, in 1868, before Gwynne, J.

It was found that on no one of the eight days that the vessel ran under the agreement did she make \$75.

Evidence was also given on the point of notice.

The jury, in answer to questions submitted to them by the learned judge, found: 1st, That defendant did not give direct notice to plaintiff that the boat was not making \$75 per day, to enable him to exercise his option; 2nd, That plaintiff had knowledge of that fact, so as to enable him to exercise his option; 3rd, That the boat stopped because

she did not make \$75 per day, and because no arrangements having been made with the railway, there was no hope of its making it.

The learned judge considered the measure of damages would properly be the \$2000 paid by plaintiff for the six weeks' running, less the seven or eight days when she did run, and a verdict was taken for plaintiff for \$1330.56, with leave reserved to defendant to move to set it aside and enter it for him, if the Court should be of opinion that the plea was good, and that it was proved by the finding of the jury.

In Easter term, 1868, *McMichael* moved accordingly on the leave reserved, and on the ground of misdirection as to the damages.

Crooks shewed cause, and *McMichael* supported his rule.

The case was re-argued during this term, both on the rule and on the demurrer to the amended plea, the same counsel appearing as before.

HAGARTY, C. J., delivered the judgment of the Court.

From the view we take it is unnecessary to discuss many of these objections.

We think the finding of the jury proves the plea as to notice.

If the plaintiff's construction of the agreement is correct, that defendant was bound absolutely to run the first period of six weeks, we agree with the learned judge that the \$2000 paid would be a fair guide to the damages for not running for the six weeks, and that deducting the proportion of time therefrom, during which she did run, would give the right amount. This is also (as we understand) the view of the Court on the first argument.

The demurrer was argued at the same time.

When the former judgment was given no present member of this Court was then on the bench of the Common Pleas.

We think we are, nevertheless, bound to adhere to the judgment then pronounced, as to the meaning of the con-

tract between the parties, whatever our individual views may be thereon. We do not, as at present advised, fully accept that construction, and incline much more to the plaintiff's contention; but we think we must follow it till reversed by a Court of Error. The same necessity would probably exist to take the case into Appeal, were we now to decide against the former judgment.

With this view we think the defendant's rule must be made absolute to set aside the verdict, and enter judgment for defendant on demurrer to the plea.

We have again to express our regret at the waste of time and money caused by permitting parties to try issues in fact before issues in law on the same pleading are determined.

Rule absolute to set aside verdict, and judgment for defendant on demurrer.

LOWE V. HALL.

Promissory note—Stamps not wholly cancelled.

The non-cancellation of some of the stamps to a promissory note, though the rest have been cancelled, invalidates the note, and the plaintiff cannot recover upon it.

THIS was an action on a promissory note, made by defendant, dated 1st January, 1868, payable to one Downs, or order, and endorsed to plaintiff.

The defendant pleaded that the note had not, when made or endorsed to and received by the plaintiff, the stamps thereto affixed, impressed, or placed thereto, to wit, to the value of 96 cents, nor were the said stamps affixed thereto in double value, as required by law, by said plaintiff, or by any person on his behalf, at the time plaintiff became the holder.

The trial took place before Wilson, J., at the Cayuga Assizes, and upon the production of the note, which was

for the sum of \$2976.56, with interest at the rate of 10 per cent., payable six months after date, it apparently had stamps affixed to the amount only of 90 cents, in place of 96 cents, which, it was admitted, was the duty required by law. The stamps appearing on the note were duly cancelled.

The defendant's counsel objected that the note was not sufficiently stamped, upon which the plaintiff's counsel stated that the stamps deficient on the face of the note would be found under the others, and upon removing the upper stamps two others, one for three and another for nine cents, were found, but they were uncanceled. The defendant then contended that, in consequence of this omission, the stamps were, under the provisions of Stat. 29 Vic. ch. 4, sec. 3, of no avail, and the note invalid and of no effect. Upon this the learned judge directed a nonsuit, with leave to plaintiff to move to enter a verdict for him, if the Court should be of opinion that he was entitled to recover.

James Miller obtained a rule to set aside the nonsuit or to enter a verdict for plaintiff, upon the grounds, among others, that the note sued upon had stamps affixed thereto to the value of 96 cents, to wit, to the value of 99 cents, and that plaintiff's case was admitted on the record, and defendant did not displace it, nor was the plea of the defendant proved.

Harrison, Q.C., shewed cause, and *Miller* supported his rule.

GALT, J., delivered the judgment of the Court.

The questions in dispute between the parties are, first, whether the fact of stamps to the amount required by law having been actually affixed to the note at the time when it was made, the note is void, under the statute, owing to the non-cancellation of the stamps for three cents and six cents, respectively ; and secondly, whether such an objection is open to the defendant on the pleadings.

Both these questions have been already decided in the case of *Young v. Waggoner* (29 U. C. p. 35) against the plaintiff, in a case similar in its circumstances to the present, except that in that suit none of the stamps were cancelled, whereas in this some of them have been. The statute, however, makes no distinction between notes insufficiently stamped and notes without any stamp; consequently this rule must be discharged.

If it were necessary to amend the pleadings, in order to let in the defence, we must have followed the intimation given by the Court of Queen's Bench, in *Young v. Waggoner*, as to the course which they would have felt themselves called upon to pursue, and have allowed an amendment; but, in our opinion, as the statute declares that the affixing of stamps, without cancellation, shall be of no avail, it is in effect saying that the non-cancellation shall be treated as if no stamps had been affixed.

Rule discharged.

REGINA V. KING.

Sale of liquor without license—32 Vic. ch. 32 (Ont.)—Conviction—Sufficiency.

The *owner* of the shop is criminally liable for any unlawful act done therein, in his absence, by clerk or assistant; as, for instance, in this case, for the sale of liquor without license by a female attendant.

Secus, semble, if it appeared that the act of sale was an isolated one, wholly unauthorized by him, and out of the ordinary course of his business.

In this case the conviction was under 32 Vic. ch. 32 (Ont.), and set out that defendant sold spirituous liquor by retail without license, stating time and place: *Held*, sufficient, and that it was not necessary to specify kind and quantity.

J. A. Boyd, in Michaelmas Term last, obtained a rule to quash a conviction for selling liquor without license, on the grounds, amongst several others, unnecessary to mention, as not relied on, 1st, That the conviction was insufficient, in not stating what kind of liquor and what

quantity thereof were so sold; 2nd, That there was no evidence from which the magistrate could draw any conclusion of such sale by the defendant.

The papers were before the Court on *certiorari*, from which it appeared that defendant was convicted on 28th September, 1869, "for that he the said James King did, on the 1st day of September, A.D. 1869, in the said city of Toronto, sell spirituous liquors by retail, without having first obtained a license authorizing him so to do." The conviction was on the information of one George Albert Mason.

McMichael shewed cause and *Boyd*, supported his rule, citing *Rex v. Gill*, 1 Str. 704; *Rex v. Taylor*, Burr. 2793; 1 Hawk. P. C. 4, 5.

HAGARTY, C. J., delivered the judgment of the Court.

The last point may be disposed of by reference to the evidence. One Hall swore that he got a bottle of brandy, and paid for it \$1, in King's shop, in Toronto; that a woman served him, and no one else was in the store at the time. Evidence was offered to disprove this statement, but we have nothing to do with the weight thereof.

Mr. Boyd, however, urged that King was not liable for the woman's act in selling, he not being present, it being a criminal act, and no agency implied.

This, we think, cannot be the law. If it be contrary to law to sell liquor or any other article in a shop, the keeper of that shop is, we think, responsible for any sale made by any clerk or assistant in his shop: *prima facie* it would be his act. It may be if he could shew that the act of sale was an isolated act, wholly unauthorized by him, and not in any way in the course of his business, but a thing done wholly by the unwarranted or wilful act of the subordinate, that he might escape personal responsibility. No such case was made out.

Another witness for the prosecution swore that King had at that time bottles of liquor exposed in his store for

sale. I refer to *Paley* on Agency, 303; *Rex v. Gutch* (1 Moo. & M. 437); *Attorney General v. Siddon* (1 Tyr. 47, and cases there cited, also reported in 1 C. & J. 220); *Regina v. Stephens* (L. R. 1 Q. B. 702); 1 *Taylor* on Evidence, 114: "The principle of the law being, both in criminal and civil cases, that a person is liable for what is done under his presumed authority"; *Attorney General v. Riddle* (2 C. & J. 493). The question is discussed in *Paley* on Convictions (1866), page 72, and notes.

The first point has to be decided almost without direct authority.

In *Rex v. Fuller* (2 Barnardist. 287 and 396, A.D. 1733), the conviction was for selling brandies and other distilled liquors without license. Many objections were taken, and amongst others "that it is said he sold by retail, without saying by what measure." The Court quashed the conviction on other grounds. They discuss several of the objections, but take no notice of this.

In *Rex v. North* (6 D. & R. 143) the conviction was that defendant did, on &c., at &c., sell beer or ale by retail, to be drunk or consumed in his house or premises, without license, &c. The conviction was quashed on account of the alternation, beer or ale. The evidence pointed to his selling ale only. Bayley, B., says, "Here the charge is, that defendant committed either one offence or the other.

* * * The evidence upon which the magistrates convict applies to selling ale alone." No other objection was taken.

In the recent case of *Regina v. Donnelly*, ante p. 165, we had to consider the effect of using the precise words of the statute creating the offence. The language of Buller, J., is cited: "When a particular Act constitutes the offence, it may be enough to describe it in the words of the Legislature; but where the Legislature speaks in general terms, the conviction must state what act in particular was done by the party offending, to enable him to meet the charge;" and *Paley* on Convictions, 218: "It may be collected, as a general rule, that where an Act, in describing the offence,

makes use of general terms, it is not enough to follow the words of the statute, but it is necessary to state what particular fact prohibited has been committed." See the cases cited in the report.

Here the statute of Ontario (32 Vic. ch. 32, sec. 1) says : " No person shall sell by retail any spirituous, fermented, or other manufactured liquors, within the Province of Ontario, without having first obtained a license," &c., &c. Sec. 22 : " Any person who shall sell or barter spirituous, fermented or manufactured liquors of any kind, without the license therefor by law required, shall forfeit," &c., &c. The act allows the forms provided by ch. 103, Consol. Stat. Canada. On turning to the form of conviction thereunder, we find, " for that the said A. B. (stating the offence and the time and place where and when committed)."

Here it is set out that King did, on 1st September, 1869, in the city of Toronto, sell spirituous liquor by retail, without having first obtained a license, &c. Time and place are given, and the words of the Act followed.

The offence charged is not " the legal result of certain facts," which, according to Donelly's case, would not suffice : it is rather, in the words of Buller, J., " where a particular Act constitutes the offence, it may be enough to describe it in the words of the legislature."

The offence prohibited is selling spirituous liquors without license, and the conviction states that the applicant, King, did so at a named time and place. We think we can uphold this conviction.

Rule discharged.

ROBERTSON V. GLASS.

Bill of exchange addressed to Secretary of Co.—Acceptance in name of Co., as Secretary—Pleading.

In an action, against defendant, by endorsee, on the following bill of exchange :

\$800.

Two months after date pay to the order of myself, at the Jacques Cartier Bank, in Montreal, eight hundred dollars, value received, and charge the same to account of

JAMES GLASS,

Secretary Richardson Gold Mining Co.,
Belleville, Ont.

E. E. GILBERT.

Held, on demurrer, not to be the acceptance of defendant and that he was not personally liable.

PLAINTIFF declared as indorsee of an overdue bill of exchange for \$800, drawn by one E. E. Gilbert, payable to his own order, upon defendant, as Secretary of the Richardson Gold Mining Company, which bill of exchange defendant, as such Secretary, accepted, but did not pay the same.

Defendant pleaded that at the date of the said bill of exchange the Richardson Gold Mining Company was and continued to be a corporation, incorporated under the laws of this Province, and that at the time the bill was drawn and presented to him defendant was Secretary of said Company, and that it was drawn on him in his official capacity, and that the same and the alleged acceptance thereof were in the words following, (as in the head-note); and that in no other manner was the bill of exchange accepted, of all which plaintiff when he took the said bill had due notice.

To this plea plaintiff replied, that at the time of the drawing and acceptance of the said bill of exchange the Richardson Gold Mining Company had no power or authority to accept the same, so as to bind said Company, but defendant, being Secretary and one of the Trustees or Directors of said Company, and having, as such Secretary

and Trustee or Director, supervision and control *over the funds of said Company*, accepted the bill as in the declaration alleged.

To this defendant rejoined that the bill was drawn on the defendant in his official capacity, as Secretary of the Company, and that the only acceptance thereof was that in the plea set out.

To this rejoinder plaintiff demurred, and defendant excepted to the replication.

Britton, for the plaintiff, cited *Simpson v. Carr*, 5 U. C. 326; *Nicholls v. Diamond*, 9 Ex. 154; *Bank of Montreal v. De Latre*, 5 U. C. 362. [The CHIEF JUSTICE referred to *Mare v. Charles*, 5 E. & B. 978].

Bell (of Belleville), Q. C., contra, cited *Lewis v. Nicholson*, 18 Q. B. 503; *Murray v. East India Co.*, 5 B. & Al. 204; *Neale v. Turton*, 4 Bing. 149; *Penrose v. Martyr*, 1 E. B. & E. 499; *Aggs v. Nicholson*, 1 H. & N. 165; *Gilbert v. McAnnany*, 28 U. C. 384.

GWYNNE, J., delivered the judgment of the court.

This roundabout mode of pleading, no doubt, has been adopted for the purpose of raising an issue in law, whether the defendant is or is not liable upon the bill as acceptor, instead of an issue in fact upon the plea of *non-acceptit*.

In the case of *Gilbert v. McAnnany et al.* (28 U. C. 284) the plaintiff therein, as the drawer of this identical bill of exchange, declared against the defendants therein, as "Trustees of the Richardson Gold Mining Company, being a Joint Stock Company, formed under the 22 Vic., ch. 22, and that the plaintiff, on the 19th February, 1868, by his draft directed to the Company, required the Company to pay to the order of the plaintiff, at la Banque Jacques Cartier, at Montreal, \$800, two months after date, and that the Company, by James Glass, their officer and Secretary, duly authorized, signed the draft as the acceptors thereof, and that the name and style of the Company and the amount of the capital stock were not written or printed

in letters at the head of the draft, in the manner required by the said Act, and the draft has not been paid by the Company nor by the defendants; wherefore the plaintiff sues the defendants according to the form and effect of the statute."

To that declaration the defendants thereto pleaded that the Company did not, by James Glass, their officer and Secretary, duly authorized, or otherwise, accept the bill in manner and form alleged.

In that case the Court has held that the bill, being directed to Glass, as Secretary of the Company, authorized him to accept it as he did on behalf of the Company, if he had authority from the Company so to act for them; but that the Company had no power to accept bills; and that if the Company had had power to accept bills, they could have been bound by the acceptance of this bill *per* Glass; but that the Company, not having power to accept bills, the Trustees were not liable for not inserting the name, style and capital stock of the Company in the bill, and that not having contracted individually they could not be made personally liable.

Now this is a solemn decision of the Court of Queen's Bench upon this identical bill, that the bill was sufficiently addressed to and accepted by the Company to have made the Company liable, if they had had power given them to accept bills of exchange. Whatever view I may myself entertain, as to the sufficiency of the address of the bill, as being upon the Company, as the drawers, without which an acceptance by the Company could not be effectual, I feel myself bound to follow the decision of the Court of Queen's Bench expressly given upon the point, and I have no hesitation in saying that, in our judgment, if the bill be sufficiently drawn upon the Company, the terms of the acceptance are such as plainly to indicate that the Company are the acceptors and not Mr. Glass, and that therefore judgment upon the whole record should be in favour of the defendant.

But, treating the draft to be, as stated in the declaration,

here, drawn upon the defendant Glass, as Secretary of the Company, although the words "Secretary, &c., &c.," seem to be inserted in the bill itself, as descriptive of the person, we must, I think, read the declaration as averring that in fact the bill was drawn upon the defendant *as*, or in his character of, Secretary, and that it was *in such character only* that the declaration alleges he did accept it.

Now, the plea alleges, as a matter of fact, that the *Richardson Gold Mining Company* is a body corporate, incorporated by the laws of this Province. This is a material averment, admitted by the subsequent demurrer; material in this, that the Company being an incorporated Company, the defendant cannot be held to be liable, upon the authority of *Nicholls v. Diamond* (9 Ex. 154), as the acceptor of a bill, upon behalf of a firm of which he is a member.

If this bill had been addressed to John Glass individually, without the addition of *Secretary, &c., &c.*, then, *primâ facie*, writing the word "accepted" across it indicates an intention that there shall be a valid acceptance, and, upon the authority of *Mare v. Charles* (5 El. & Bl. 981) "when a drawee accepts a bill, unless there be on the face of the bill a distinct disclaimer of personal liability, he must be taken to accept personally." But, in this case, it does appear to me that the mode of the acceptance is such as clearly to convey that all idea of personal liability is excluded: the words are, "Accepted—the Richardson Gold Mining Company—per John Glass, Secretary." Now, it seems plain that it is the Company which is intended to be bound, and that the acceptance is the acceptance of an incorporated Company, per their Secretary; but, coupling the terms of the acceptance with the admission in the declaration, that it was *in his character* of Secretary of the Company that the bill was drawn upon the defendant, there can, I think, be no reasonable doubt that all idea of personal liability is excluded. The plaintiff, by his replication, attempts to get over this difficulty by alleging that the Company had no power to accept the

bill, and that the defendant had no authority to accept it for them, so as to bind them. These are two distinct matters; as to the first of which it must be held to have been as much within the knowledge of the drawer, as of the drawee, that the Company had not by its Act of incorporation power to accept bills of exchange. Their not having that power cannot prejudice the defendant; his liability depends upon the fact, whether he, by the terms of the acceptance written on this bill, treating it as drawn upon him, excluded all idea of his personal responsibility or otherwise; and as to the second point, that he had no authority to accept for the Company, so as to bind them, assuming that the Company had power to accept, that might render him liable upon a special count for representing himself to have an authority which he had not, but will not render him liable, as acceptor, if the terms of the acceptance are such as to exclude the intention of making himself personally responsible.

This is the point of the case, and I think that upon the facts, as disclosed upon the record and admitted by the demurrer, our judgment must be that the defendant is not liable.

HAGARTY, C.J.—This case, if decided against the defendant, will certainly carry the law of personal liability farther than it has yet gone.

No one can read the draft and the acceptance without being convinced that a personal liability of Glass was not in contemplation. The only legal point against him is that urged in *Mare v. Charles*. There the bill was certainly drawn on defendant personally, and when he wrote on it, "accepted for the Company, J. Charles," there was little, if any thing, to shew a disclaimer of personal liability. Lord Campbell says, "In the present case the acceptance is not *per proc.* the Company. If it were, perhaps that might have some weight, as amounting to a disclaimer of personal liability." In the latest case cited, of *Alexander v. Sizer* (L. R. 4 Ex. 102), Kelly, C. B.,

noting the differences between the cases on notes and bills, says, "If express words of exclusion were to be used, the result might be different; but then the acceptance would in fact be no acceptance at all. * * By his acceptance of a bill which is addressed to him it becomes his contract, and words of mere description or qualification are not enough, according to the usage of merchants, to exonerate him."

I have also examined the late case of *Township of Toronto v. McBride*, (29 U. C. 13). The acceptance in one case is, certainly, as far as words go, the acceptance of the Richardson Company. The Court of Queen's Bench seem to hold that the bill is also addressed to the Company. Without resting on that expression, I am prepared to hold that defendant did not accept this bill so as to bind himself. If the law is to be carried further than heretofore, I prefer its being done by a Court of Error. At present, I think it has gone quite far enough.

GALT, J., concurred.

Judgment for defendant on demurrer.

WILLIAMS V. ROBINSON.

Seduction—Evidence of rape—Duty of Judge—New trial refused.

Held, following *Walsh v. Nattrass*, 19 C. P. 453, that where, in an action of seduction, the evidence of the witness shews that a rape was committed upon her, it is the duty of the Judge, in the interests of public justice, to stop the case, and not leave it to the jury, with a direction to find for defendant, if in their opinion it was rape; and this, even where the Judge himself is not clear that a rape has been committed. But, *Held*, that *defendant* cannot set aside the verdict for misdirection in this respect, as this will only be done *in the interests of public justice*.

SEDUCTION of plaintiff's daughter.

Plea, not guilty.

At the trial, at Toronto, before Wilson, J., the plaintiff's daughter swore to three acts of sexual intercourse with

defendant, all of which she swore took place by force and against her will. She gave details as to place and time, &c.

The learned Judge inclined to think that it was rape on each occasion, but, as appeared from his report, did not feel so clear on the point as to withdraw the case from the jury, and he therefore left it to them, with a direction to find for defendant, if they thought a rape or rapes had been committed.

The jury found for plaintiff.

M. C. Cameron, Q. C., obtained a rule, on this branch of the case, to set aside verdict for misdirection, in leaving it to the jury to say whether a rape had been committed, instead of stopping the case, or directing a verdict for defendant, on the ground that the evidence proved a rape.

Harrison, Q. C., and *Moss*, shewed cause, citing *Walsh v. Nattrass*, 19 C. P. 453; *Hoyle v. Hoyle*, 3 O. S. 295; *Brown v. Dalby*, 7 U. C. 160.

Cameron supported his rule.

HAGARTY, C. J.—This question has been before the Courts several times: *Vincent v. Sprague* (3 U. C. 283); *Brown v. Dalby* (7 U. C. 160); and lately before this Court, in *Walsh v. Nattrass* (19 C. P. 453).

In addition to what I said in the latter case, I would add that I am of opinion that the question of rape or no rape is one for the Judge at the trial. If he believes a rape has been committed, I think it is his duty, in the interests of public justice, to stop the case. He must not, I think, leave it to the jury, telling them to find for defendant, if they think it was a rape. The case should not go to them, and the defendant is not entitled to a verdict on any such ground.

Even if the Judge were not, perhaps, morally satisfied that a rape had been committed, yet, as was said by the late Sir J. Robinson, in *Brown v. Dalby*, "If the only witness examined had proved the act to have been feloniously

done, and there had been no circumstances sworn to by her which seemed inconsistent with such a relation, nothing that could make the disbelief of it otherwise than purely arbitrary, the directing a nonsuit, without submitting it to the jury, could not be deemed wrong."

I would certainly consider the case should be stopped under circumstances like those last suggested.

Now, in the present case, the learned Judge did not stop the case, and the jury found for plaintiff.

In *Brown v. Dalby* the C. J. says, "We do not consider that under such circumstances it lies in the mouth of the defendant to object to this verdict, on the ground that the jury were bound to believe that he had committed a greater wrong than he was charged with, and that they took a too favourable view of his conduct."

As the jury found for the plaintiff, and, apart from stopping the case, the defendant had the benefit of a direction that he should have a verdict if a rape were found, I feel great difficulty in acceding to his claim to have that verdict set aside. If we set aside the verdict it must be, not for the defendant's sake, or because we think he ought to have had a verdict, but it would be on the same grounds that the learned Judge should have stopped the case, viz., the grounds of public policy and justice.

As I read the evidence I cannot see how, on such testimony, the defendant could (if indicted) have been convicted of rape. I cannot but feel strong doubts of the girl's truthfulness on this point. I cannot see how we should now be called on to interfere at the direct instance and request of the defendant, because, in the language of *Brown v. Dalby*, we are "bound to believe that he committed a greater wrong than he was charged with, and that the jury took a too favourable view of his conduct."

At the same time I cannot but feel that, where a woman, the only witness to prove the connexion, chooses to say it was a rape, notwithstanding any amount of improbability in her story on that point, a jury might very justly reject her evidence altogether and find for the defendant, not on

the ground that a rape had been committed, but because the plaintiff's witness was unworthy of belief. In this case there was other evidence corroboratory of a connexion having taken place.

On the whole, I do not think we can interfere as we are urged to do by the defendant.

GWYNNE, J.—I continue to be of the opinion which I expressed in *Walsh v. Nattrass* (19 C. P. 453), that, upon the trial of an action for seduction, a Judge is not justified in submitting the case to the jury with a direction to them, first, to find whether the act constituting the seduction was a felonious act, and, if it was, to render a verdict for the defendant, but otherwise to proceed with the determination of the case; for, if the question, whether the act, which gives to the plaintiff his cause of action, was or not a felonious act, involves such a doubt as to require the intervention of a jury to determine it, the Judge should stop the civil action, as not yet ripe for trial, until the question of the felony should be tried and determined. It is the Judge, and not the jury, whose duty it is to determine whether a case is or not ripe for trial; and if the evidence given, assuming it to be true, shews the act, which gives to the plaintiff his cause of action, to have been a felony, there is no alternative left to a Judge but to give the plaintiff the option of accepting a nonsuit, or to stop the case until the felony shall be disposed of in due course of law. Submitting to a jury, in the civil action, the question whether the felony has been committed or not, is submitting to them a question which they have no right to try, and is in effect submitting to them the question whether, in their opinion, the case is ripe for trial.

Where, however, a Judge does submit the question of felony or no felony to the jury, and directs them to find a verdict for the defendant, if they should be of opinion that a felony was committed, I do not yet see that the defendant, after a verdict in the civil action rendered against him upon such a charge, has a right to set aside that

verdict as against law and evidence, or for misdirection : it is only the public policy of the law which requires the Judge to intervene, in the interest of the State, to stay the civil action until the charge of felony is disposed of by the proper tribunal, and I cannot see that his not so intervening gives the defendant a right to set aside the verdict, as a wrong done to him and contrary to law.

GALT, J., concurred.

Rule discharged. (a)

THE CHIEF SUPERINTENDENT OF EDUCATION IN RE
CHAPMAN V. THRASHER ET AL.

School rates—Levy upon non-resident of school section.

School trustees, and collectors under their warrants, have no power, either under Consol. Stat. U. C. ch. 64, or 23 Vic. ch. 49, to levy on the property of a non-resident of the school section for rates assessed in respect of property within that section.

THIS was an appeal under the Common School Act (C. S. U. C. ch. 64).

William Chapman sued Joseph Thrasher, Thomas Davy, and Albert Jones, in the Eighth Division Court of the county of Hastings, for that they, on the 7th June, 1869, at the township of Thurlow, unlawfully took and converted to their own use, and wrongfully deprived him of the use and possession of his goods and chattels, that is to say, of one cow of the value of \$25 ; and the plaintiff claimed \$30.

At the trial, the defendants, having been proved to have taken the cow upon and from lot number 20, in the 7th concession of Thurlow, justified doing so as trustees of school section number 16, in the said township, for the purpose of levying a rate duly assessed against Chapman in respect of the south halves of lots numbers 20 and 21,

in the eighth concession of Thurlow, which last mentioned lots were claimed to be in the school section number 16. The place where the cow was taken was admitted or proved to be within school section number 17, but the defendants claimed the right to seize it there for the rate assessed upon Chapman's property in school section number 16, under 22 Vic. ch. 64, sec. 27, sub-sec. 2, and 23 Vic. ch. 49, sec. 21.

For the plaintiff it was contended that, assuming the defendants to be trustees, and one of them, namely, Davy, to have been appointed collector, they had no authority to levy on plaintiff's property outside of school section number 16 for a rate imposed upon property within that school section; that there was no proof of any demand of the rate having been made; that there was no evidence that the defendants, or any of them, were trustees of school section number 16, or had taken the declaration of office.

The learned Judge of the Division Court gave a written judgment in favor of the plaintiff, with \$20 damages, and costs, but he did not in his judgment state upon what grounds he proceeded.

From this judgment the Chief Superintendent of Education appealed for the following reasons: 1st, That the plaintiff was liable for school rates in the school section for which the defendants were trustees; 2nd, That the defendants, as such trustees, had authority to issue their warrant to the collector for the collection of such school rates from the plaintiff; 3rd, That such collector, in collecting such school rates, had the powers of township municipal collectors, and could levy such rates without the boundaries of the school section, and within the boundaries of the municipality; 4th, That the collector, and not the defendants, is liable for any excess of jurisdiction in levying said rates; 5th, In any event that trespass would not lie against the defendants for the acts complained of.

Diamond, for the respondent, made a preliminary objection that the case was not ripe for hearing without

proof of service upon the clerk of the Eighth Division Court, where the judgment was rendered, of the statutory notice of appeal. He then referred to *Gillies v. Wood*, 13 U. C. R. 357, as to the inability of the trustees to give power by warrant to be executed outside of the section for which they are appointed. He also referred to *Haacke v. Markham*, 17 U. C. R. 562.

Hodgins, for the appeal, cited *Chief Superintendent, &c., Township of Moore v. McRae*, 12 U. C. 525; Consol. Stat. U. C. ch. 64, sec. 27, sub-secs. 2, 11, 12, 15; ch. 54, secs. 22, 23, 24, 25; ch. 55, sec. 103; 23 Vic. ch. 49, sec. 21.

GWYNNE, J.—The sections of the Statute relating to the preliminary objection are sec. 108 and subsequent sections. By sec. 108 it is enacted that, “it being highly desirable that uniformity of decision should exist in cases within the cognizance of the Division Courts, and tried in such courts, in which the superintendent, trustees, teachers, and others acting under the provisions of this Act are parties, the Judge of any Division Court, wherein any such action may be tried, may, at the request of either party, order the entering of judgment to be delayed for a sufficient time to enable such party to apply to the Chief Superintendent of Education to appeal the case, and after notice of appeal has been served, as herinafter provided, no further proceedings shall be had in such case until the matter of the appeal has been decided by a Superior Court.”

The 109th section provides that, “the Chief Superintendent may, within one month after the rendering of judgment in any such case, appeal from the decision of the Division Court Judge to either of the Superior Courts of law at Toronto, by serving notice in writing of such appeal upon the clerk of the Division Court appealed from;” and by sec. 110, “the judge whose decision is appealed from shall thereupon certify under his hand to the Superior Court appealed to the summons and statement of claim, and other proceedings in the case, together

with the evidence and his own judgment thereon, and all objections thereto ;” and by sec. 111, “the matter shall be set down for argument at the next term of such Superior Court, and *such* court *shall* give such order or direction to the court below touching the judgment to be given in the matter as law and equity require.”

Now, the summons and proceedings in the Division Court, together with the evidence taken, and the Judge’s own written judgment, and all objections made at the trial to the right of the plaintiff’s recovering, which I presume is what is meant by the words in the statute, “and all objections made thereto,” have been sent to this Court certified by the Judge under his hand ; but there is no reason why the Judge should so certify the proceedings unless in obedience of the 110th section, that is, in consequence of the clerk of his court having received the notice directed by the 109th section to be served on him. In the absence of any rules made by the Superior Courts regulating these appeals, I think that when we find an appeal case set down for argument here upon proper transmitted certificates, under the signature of the Judge, as directed by the 110th section, we must assume that the notice, requiring the Judge to certify the papers to the Superior Court, had been served upon the clerk of the court where the judgment was rendered. The matter, being set down here for argument, must, I think, be disposed of by us, in obedience to the 111th section, upon the merits.

Gillies v. Wood (13 U. C. 357) is an express decision of the Court of Queen’s Bench, on demurrer, upon the 13 & 14 Vic. ch. 48, sec. 12, from which 22 Vic. ch. 64, sec. 27, sub-sec. 2, is consolidated, “that the trustees of a school section can give no power by warrant, to be executed, nor can the collector make any levy upon such warrant, unless within the limits of the school section for which such trustees are appointed.

Sitting, as we do in this case, as a court of final appeal, we are not concluded by the judgment in *Gillies v. Wood*, unless we concur therein.

Mr. Hodgins contends that the 23 Vic. ch. 49, sec. 21, passed since that judgment was rendered, has made an alteration in the law, and deprived that case of application as a case binding on the point in issue. That section enacts that "collectors of school rates shall have the same powers, and be under the same liability and obligations in their respective municipalities, as township collectors have and are liable to in their respective municipalities, and shall give such security as may be satisfactory to the trustees." Whatever may have been the object of this section, it has not, in my opinion, any such effect as is contended for by Mr. Hodgins, but, on the contrary, seems to establish more clearly than sub-sec. 2 of sec. 27 had done, that the powers of the collector, as well as his liability and obligations, are confined within the limits of *their* respective municipalities, which term I have no doubt means "school sections."

But it is not so much upon the power of the collector of the school rate as of the trustees to enforce payment of the school rate, that the question turns.

By 22 Vic. ch. 64, sec. 27, it is enacted that "it shall be the duty of the trustees of each school section, and they are hereby empowered" (sub-sec. 2) "to appoint, if they think it expedient, one of themselves, or some other person, a collector, who may also be secretary-treasurer," (here they appointed the defendant Davy), "to *collect* the rates by them imposed upon *the inhabitants* of their school section, or the sums which the said *inhabitants* have subscribed, and every such collector shall have the same powers, by virtue of a warrant signed by a majority of the trustees, in collecting the school rate or subscription, and shall proceed in the same manner as ordinary collectors of county and township rates and assessments."

Now the rates which by this section may be collected by warrant and levy, are the rates imposed "upon *the inhabitants* of their school section;" and by sub-sec. 14 of sec. 27 it is declared to be the duty of the trustees of each school section, and they are thereby empowered, "to

sue for and recover by their name of office the amount of school rates due from persons *residing without the limits of their school section*, who make default in payment;" and by sub-sec. 15, "to make a return to the clerk of the municipality of the amount of any rate imposed by them for school purposes, whenever so imposed, *and also*, before the end of the then current year, *to make a return of the rates on the property of non-residents of their section*, as provided in the 127th section of this Act, and which they have been unable to collect."

By the 127th section it is enacted that, "if the collector so appointed by the trustees of any school section be unable to collect that portion of any school rate which has been charged on any parcel of land liable to assessment (*by reason of there being no person resident thereon, or no goods and chattels to distrain*), the trustees shall make a return to the clerk of the municipality of all such parcels of land and the uncollected rates thereon, and the clerk shall make a return to the county treasurer, and such arrears shall be collected and accounted for by such treasurer in the same manner as the arrears of other taxes, and the township in which such school section is situate shall make up the deficiency arising from uncollected rates on lands liable to assessment, out of the general funds of the municipality. Then the 21st section of 23 Vic. ch. 49 enacts that collectors of school rates shall have the same powers in their respective school municipalities as township collectors have in their respective municipalities.

It appears then, to me, to be clear that the power or jurisdiction of school trustees, in so far as *levying* a school rate *by warrant* is concerned, is confined to a jurisdiction over the *inhabitants of*, or residents *in*, the school section, duly assessed. Rates assessed in respect of property in a school section can be recovered from persons not inhabitants of or residents within the limits of that school section only under the 14th sub-sec. of sec. 27, by suit, or under sec. 127.

Mr. Hodgins's contention, on behalf of the appellant, was

that the collector of a school rate, under a warrant issued by the trustees, has the same authority *outside* of his school section, for the collection of the rate, as a township collector has *outside* of his township for the collection of the rates on the roll delivered to him for collection.

If this be so, then the school rate collector's powers extend, equally with that of the township collector, to the limits of the *county*, whereas the words of the statute are that the collector's powers *within* his school municipality, which I read to be "school section," shall be the same as those of the township collector *within* his municipality or township.

Moreover, the township collector has no authority to collect the taxes due in respect of *non-resident lands*, whether the owners of such lands reside within the township or without it, within the limits of the county: his authority extends only to collect from the persons named on his roll who are personally assessed, and so made liable to pay the taxes at which they are rated on the roll; but school trustees have no power to rate personally, that is, so as to make personally liable any persons who are not inhabitants of the school section. Persons who are not inhabitants of a school section, in so far as a trustee's school rate is concerned, bear an analogous position to owners of non-resident lands in respect of municipal rates, who do not appear upon the collector's roll, and whose taxes the township collector does not collect; so that the analogy, contended for by Mr. Hodgins, between the authority of the school rate collector of a trustee rate and the township collector of municipal rates, as to levying outside the limits of the municipality, does not and *cannot exist*.

It has been objected that the trustees are not liable in trespass, but that they should have been sued in case; but the evidence was that all three defendants acted in the taking away of the cow. They were then *primâ facie* trespassers, and it was for them to justify, by shewing that they acted within their jurisdiction. In this they failed, not only for the reason that school trustees have no juris-

diction to levy a school rate by seizure of the property of a person not an inhabitant of the school section, but residing without the limits thereof, but for this further objection, which, I think, was well taken by Mr. Diamond, that in fact they gave no legal evidence of their being trustees.

HAGARTY, C. J.—I agree in holding that the judgment in the court below was right. My judgment turns on the point that Chapman, not being an inhabitant of section 16, was not liable to have his personal property outside the section seized or sold for school rates. I do not think the act of 1860 at all strengthens the appellant's argument.

If Chapman, not being an inhabitant, was not subject to the trustees' warrant, it is useless to discuss the other question of the collector's power.

Sub-secs. 2 and 14 of sec. 27, of ch. 64, I think, shew clearly the intention of the Legislature. The Court of Queen's Bench, in *Gillies v. Wood*, so decided, and I see no reason to differ from their conclusion. By sec. 33, if a man has land within two or more school sections, the lands are to be returned separately within each section, "but every individual occupied lot, or part of a lot, shall only be liable to be assessed for school purposes in the school section where the occupant resides." Now, in such a case, the lot would be assessable only in the section where the owner resided.

On the whole, I think the appeal must be dismissed with costs. I see nothing in the objections as to suing in case instead of trespass, &c.

GALT, J. concurred.

Appeal dismissed, with costs.

CALVIN V. THE PROVINCIAL INSURANCE COMPANY.

Insurance Co.—Parol agreement by agent to refer to arbitration—Pleading.

Held, on demurrer to a plea setting up the absence of the corporate seal, that a *parol* agreement, entered into by "the duly authorized agents" of an incorporated Insurance Co., to refer to arbitration the question of the legal liability of said Co. to bear any portion of the expenses of raising and repairing a vessel, insured by them, and subsequently lost, was not binding upon the Co., as not being a contract relating to the purposes for which the Co. was incorporated.

DECLARATION, that the defendants, on 8th April, 1864, executed a policy of insurance for \$4,250, in favor of James Stevenson and Thomas Harbottle, on the schooner "Rapid," valued at \$16,000, against perils of the lakes, rivers, canals, fires that should come to the damage of the said vessel, or any part thereof; and, in case of loss or misfortune, it was by the policy declared that it should be necessary for the insured and their agents to give the assurers prompt notice of the disaster and plan adopted for recovering and saving the property, and to make all proper exertions for the recovery of the vessel; and in case of neglect or refusal on the part of the insured to adopt prompt and efficient measures for the recovery thereof, or to repair same, when recovered, then said insurers were thereby authorized to interpose and recover said vessel, and to cause same to be repaired for account of the insured with expedition, whereof the said Insurance Company would contribute according to the proportion that the sum insured should bear to the valuation aforesaid: *Averment*, of another policy, executed by the Home Insurance Company with Stevenson and Harbottle, upon the schooner, and that said Company was similarly liable to make good to insured a proportionate part of any loss or damage; with further averment of loss and damage by being sunk in the harbor of Kingston, when a steam-tug or vessel of plaintiff's was engaged in towing the schooner; that the defendants and the Home Insurance Company became liable to pay a proportion of the loss and damage sustained by the schooner, and being notified of such loss or damage, and being desirous of

taking prompt means for the recovery and repairing of said vessel, *by their respective duly authorized agents in that behalf*, entered into an agreement in writing with plaintiffs, dated 13th September, 1864, whereby, after reciting that said schooner "Rapid," when in tow of a steamer owned by the plaintiffs, struck on a pier in the harbor of Kingston, and thereby sank adjoining the Kingston Marine Railway, and that the liability for the expenses of raising said vessel was yet undetermined, it was agreed that plaintiffs should raise said vessel and place her on the ways of the Kingston Marine Railway, at or for the price or sum of \$3,100, *and plaintiffs and defendants, and the Home Insurance Company, should submit to the arbitrament of three arbitrators* (one to be chosen by plaintiffs, and another by defendants and the Home Insurance Company, and the third by the two arbitrators so chosen) *the question*, by whom the payment of said sum of money and the other expenses attendant on the repairs of said vessel should respectively be paid, and that said arbitration should take place forthwith; that thereupon plaintiffs raised the vessel and placed her on the ways of the Marine Railway. The declaration then averred the appointment by plaintiffs of their arbitrator, and notice thereof to defendants and the Home Insurance Company, and that plaintiffs requested them to appoint their arbitrator, yet that defendants had ever since making said agreement wrongfully refused, either in concert with said Home Insurance Company or otherwise, to appoint an arbitrator under said agreement, and had always so wrongfully refused and wrongfully continued to refuse to appoint, or concur in appointing, on their behalf and that of the Home Insurance Company, an arbitrator under said agreement; and by reason of such wrongful refusal they had deprived plaintiffs of said sum of \$3,100 and other expenses by them incurred in raising and repairing the vessel.

Pleas, that the alleged agreement of defendants was by parol only, and not under the corporate seal of defendants,

and that it was not authorized by them under their corporate seal.

Demurrer, that, as a trading corporation, defendants were liable without their seal.

Crooks, Q.C., for the demurrer, contended that, by the statutes incorporating defendants' Company, the management of its concerns was entrusted to the Board of Directors, who were authorized to appoint officers and agents, and by by-laws to prescribe their duties, and that under this the agent could have been well appointed without seal; that it was also open to them to prove authority by reason of express ratification by directors of agent's acts in this particular case, or by their adoption of the benefits secured by the agreement for the Company; and that it was merely a question of evidence, and should have been raised under a plea traversing the authority of the agent generally, and not limiting the issue to an authority evidenced by the seal of defendants.

J. H. Cameron, Q. C., and *Duggan*, Q. C., contra, contended that the agreement was equivalent to one to refer to arbitration, which would have required the seal of the Company.

The following authorities were referred to and commented on: *Nicholson v. The Guardians of the Bradfield Union*, L. R. 1 Q. B. 620; *Eastern Counties Railway Co. v. Brown*, 6 Ex. 314; *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463; *Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 815; *Lindley on Corporations*, 2nd ed., 306, 356, 357, 358; *Story, Agency*, secs. 52, 53.

GWYNNE, J., delivered the judgment of the Court.

The defendants are a Company incorporated by Act of Parliament for the purpose of making and effecting contracts of insurance, against loss or damage by fire, on any houses or buildings, and on any shipping or vessels against loss or damage by fire, water, or any other risk, and on any goods or chattels, whether ashore or afloat, and on life

or lives, or in any manner dependent on life or lives, and to grant annuities, and generally to do and perform all other necessary matters and things connected with and proper to promote these objects. The Company are empowered to have, hold, use, and employ any vessel or vessels, not exceeding two, boat or boats, that they may build, charter, or purchase, or by any lawful means be possessed of, for all purposes of, or connected with, salvage, with full power to use such vessels for the purpose of towage when not engaged for salvage purposes, and to sue for and have due remuneration for any services rendered by such vessels, with like powers, as natural persons, as to making and enforcing all agreements and contracts relative or incident thereto, or growing thereout, or connected therewith, in any manner.

The Company, therefore, is, for insurance business, a trading corporation ; and the learned counsel for the defendants admits, as no doubt the law now is settled to be, that all contracts made by the agents and managers of the Company, which relate to the objects and purposes for which the Company was incorporated, and which are not required by their act to be under seal, and are not inconsistent with the rules and regulations which govern their acts, are valid and binding upon the Company, though not under seal : *South of Ireland Colliery Co. v. Waddle* (L. R. 4 C. P. 463). The question simply is, whether the agreement declared upon is such an one as can be valid, not being under seal, and I am of opinion that it cannot. The purpose stated in the declaration is not a salvage purpose. It is not alleged that the defendants' agent had entered into any contract with plaintiffs to raise the schooner *for* the defendants ; but there being a question whether the plaintiffs themselves were not liable to the owners of the schooner for her being sunk, while in tow of the plaintiffs' steamer, the contract declared upon is alleged to have been entered into upon behalf of the plaintiffs, the defendants, and the Home Insurance Company, to submit to arbitration *the* question, in effect, whether the plaintiffs ought or not to

pay the expense of raising and repairing the vessel, or whether the Insurance Companies should pay any, and, if any, what proportion of such expenses, &c.; to submit, in fact, to arbitration the legal liability of the defendants to bear any portion of such expenses. Such a contract is not a contract which relates to the purposes for which the Company was incorporated, and is not one which should be enforced against the will of the Company, to compel them to withdraw the question of their liability from the ordinary courts of law. The appointment of an arbitrator would have to be made by a submission deed under the seal of the Company; so that the contract declared upon is in effect a parol contract *to execute* a contract under seal, and that of a peculiar nature, namely, for the withdrawal from the ordinary courts of the question of the Company's liability, and to submit that question to arbitration. Upon the authority of *The London Dock Co. v. Sinnott* (8 El. & Bl. 347), as explained by Bovill, C. J., in L. R. 4 C. P. at p. 471, a parol contract to enter into another contract cannot be enforced against a corporation, nor will an action lie for the breach of it.

Judgment must be for the defendants on the demurrer.

Judgment for defendants on demurrer.

SYMONDS V. SYMONDS ET AL.

Defective notice of trial—Promptness in objecting—Partition suit issue—Law Reform Act.

Where a defendant is not misled by a notice of trial, any trifling irregularity therein, as, in this case, the omission of the words "In the matter of partition between" before the plaintiff's and defendant's names, in the style of cause, will not entitle defendant to set aside the verdict; and, irregularities of this kind should be objected to promptly, otherwise the Court will not interfere.

Issues in partition suits are within the Law Reform Act (32 Vic. ch. 6, sec. 17, sub-sec. 2, Out.)

THIS was a partition suit between Joseph Symonds, who was the petitioner, David Symonds and several other

defendants, all of whom, except the said David Symonds, allowed judgment to go by default.

David Symonds pleaded that the said Joseph Symonds was not at the time of presenting his petition entitled to or in possession of the premises in the petition mentioned.

The cause was commenced in the County Court of the county of Norfolk, and issue joined therein. The plaintiff took the case down to trial at the Assizes for the county of Norfolk, held before Wilson, J., and a verdict was rendered for the plaintiff, no person appearing for defendant.

The notice of trial was entitled as follows: "In the County Court of the county of Norfolk. Joseph Symonds, plaintiff, v. Esther Symonds (and a number of defendants, naming them), defendants."

It further appeared from the affidavits filed that this notice was served on 8th September, for the Assizes to be holden on the 20th of that month; that the defendant's attorney never notified the plaintiff's attorney that he objected to the notice until the latter day, being the Commission day of the Assizes, at which the trial was to take place, and after the record had been entered for trial.

Ferguson obtained a rule to set aside this verdict, on the ground of irregularity, in this, that the notice of trial served on the attorney of the above named David Symonds was a nullity, or at least insufficient, in not being properly entitled, "In the matter of partition between," &c., and otherwise improperly entitled contrary to the statute in that behalf; and on the further ground that the issue joined herein in the said County Court was not such an issue as could properly be tried at the said Assizes under the Reform Act of 1868.

J. B. Read shewed cause, citing *Skelsey v. Manning* 8 U. C. L. J. 167; *Anderson v. Culver*, 10 U. C. L. J. 159; *Willis v. Ball*, 1 Dowl. N. S. 303; *Fenn v. Green*, 6 E. & B. 656.

Ferguson, contra, contended that under section 7 of the

Partition Act the notice should have been entitled, in addition, "In the matter of partition, between," &c.; and further, that the issue to be tried, being one under the Partition Act, did not come within the Law Reform Act, sec. 17, sub-sec. 2.

GALT, J., delivered the judgment of the Court.

It would have been much to be regretted if, under the circumstances of this case, we had felt ourselves constrained to give effect to such an objection as is here urged to the notice of trial. In *Arch. Prac.*, 12th ed., p. 315, it is laid down that no particular form is necessary to make a good notice, and so long as it clearly and unequivocally informs the defendant that the plaintiff intends to proceed to trial at a certain time and place, it will suffice. In the present case it is not pretended that the defendant was in any way misled by the notice, or that he had any reason to doubt that was the case intended to be tried; but, on the contrary, it is manifest that the defendant's attorney well knew what the notice of trial meant, for, after waiting until after the record was entered, and on the very day appointed for the trial, he called on the plaintiff's attorney and for the first time notified him of the objection. There is no affidavit that defendant has any defence. *Bell v. Graham et al.* (2 U. C. p. 37) is a clear authority that a slip of this kind must be taken notice of promptly, otherwise the Court will give no effect to it. That case was, in fact, a very much stronger case against the plaintiff than the present, owing to the circumstance of deaths having taken place both as regards the plaintiffs and defendants, one of each having died after issue was joined, and before notice of trial was served; nevertheless the plaintiff's attorney inadvertently served a notice of trial on the defendants' attorney, entitled in the names of all the plaintiffs and defendants, though the deaths of the two had been suggested on the record. The defendants' attorney retained the notice of trial, and gave no notice of the irregularity, or of his intention to object, but allowed the

cause to proceed, not making any defence at the Assizes. Robinson, C. J., says: "The defendants have not sworn that they were misled by the notice. It is quite obvious they could not be. Then, as they chose to lie by, giving no notice of the objection, and have made no affidavit that they have any defence on the merits, it would be contrary to the practice to set aside the verdict under such circumstances." The observations of Jones, J., in the same case, are, if possible, more applicable to the present. He says: "I think that the defendants could not have been misled by the notice; there does not appear to have been any other action in which the plaintiff was a party against the defendants; it is not alleged that they were misled, nor that they had any defence to the action," &c., &c. There are many other cases which shew that if the defendant intends to take such an objection, he must do so promptly, among others *Gordon v. Cleghorn* (7 U. C. 171). This part of the rule therefore fails.

The second branch of the rule is of more importance, and is as follows: "And on the further ground that the issue joined herein in the said County Court is not such an issue as could properly be tried at the said Assizes, under the provisions of the statute known as the Law Reform Act of 1868. By sec. 5 of the Act respecting Partition and Sale of Real Estate. it is enacted that "when such lands are situate in two or more counties, the proceedings shall be carried on in the Court of Queen's Bench or Common Pleas, or in the Court of Chancery; and when the lands are situate in one county only, the proceedings may be carried on in the County Court of such county, or in any of the Superior Courts of Law or Equity." By sec. 18, "Any party appearing may plead, either separately, or jointly with one or more of his co-defendants, that the petitioners, or any of them, at the time of presenting the petition, were not entitled to or in possession of the premises, or any part thereof, * * * and such plea shall form a complete issue." * * * By sec. 19, "All issues so joined shall be tried by the Court or a jury in the like

manner as other issues are determined, on a record made up of the said petition and of the defence pleaded thereto, and the like proceedings shall be had thereupon in every respect, as to new trials, amendments, and any other particulars as in personal actions." By the 2nd sub-section of section 17 of the Law Reform Act, "all issues of fact and assessments of damages in any County Court may be tried and assessed, at the election of the plaintiff, at any sittings of Assize and Nisi Prius for the county in which the venue is laid," &c., &c.

We are clearly of opinion that the words of this section embrace issues in partition suits, and, even were there any doubt, we consider that the provision above quoted from sec. 5 of the Partition Act would tend strongly to sustain such a construction; for it could not, in the face of that section, be successfully contended that any reason exists for asserting that issues of this kind should not be tried at the Assizes. This branch of the rule also fails.

Rule discharged, with costs.

REGINA V. CASWELL.

Conviction by magistrate—C. S. C. ch. 93, sec. 28—Insufficiency.

Held, that a conviction, purporting to be under Consol. Stat. C. ch. 93, sec. 28, charging that defendant, at a time and place named, wilfully and maliciously took and carried away the window sashes out of a building owned by one C., against the form of the statute, &c., without alleging damage to any property, real or personal, and without finding damage to any amount, was bad, and the conviction was therefore quashed.

THIS was a motion to quash a conviction made by two Justices of the Peace for the county of Simcoe, whereby one William Caswell was convicted for that he did on or about the 3rd day of May, 1869, at Coldwater, wilfully and maliciously take and carry away the window sashes out of a building owned by Maria Caswell, against the

form of the statute in such cases made and provided, and whereby also it was adjudged that the said William Caswell, for his said offence, should forfeit and pay the sum of sixteen dollars and five cents, to be paid and applied according to law, and also that he should pay to the said Maria Caswell the sum of three dollars and ninety-five cents for her costs, and that if the said several sums were not paid on or before the 2nd day of September, 1869, the said William Caswell should be imprisoned in the common gaol of the county of Simcoe for the space of one month, unless the said sums, and the costs and charges of conveying the said William Caswell to the said common gaol, should be sooner paid.

Boys shewed cause, and *McCarthy* supported his application, referring to *Charter v. Greame*, 13 Q. B. 216, 236; *Re Donelly*, ante p. 165.

GWYNNE, J.—The Act under which this conviction was professed to be made is ch. 93, sec. 28, of the Consolidated Statutes of Canada, whereby it is enacted that, "If any person wilfully or maliciously commits any damage, injury or spoil to or upon any real or personal property, either of a public or a private nature, for which no remedy or punishment is hereinbefore provided, such person, being convicted before a Justice of the Peace, shall forfeit and pay such sum of money as may appear to the Justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of twenty dollars;" and by sec. 29, it is enacted that, "In case of private property, the sum of money in the last section mentioned shall be paid to the party aggrieved, except where such party has been examined in proof of the offence, and in such case, or in case of property of a public nature, the money shall be applied in the same manner as every penalty imposed by a Justice of the Peace under this act is directed to be applied."

Now, under a similar Act in England, namely, 1 Geo. IV.,

ch. 56, which was an Act for the summary punishment, in certain cases, of persons wilfully or maliciously damaging or committing trespasses on public or private property, it was enacted that, "If any person shall wilfully or maliciously commit any damage, injury or spoil, to or upon any building, fence, hedge, gate, &c., &c., or to or upon any real or personal property of any nature or kind soever, and being thereof convicted before a Justice of the Peace, shall forfeit and pay to the person or persons aggrieved such sum of money as shall appear to such Justice to be reasonable satisfaction and compensation for the damage or injury or spoil so committed, not exceeding in any case the sum of five pounds, which said sum of money shall be paid to the person aggrieved; but in case the conviction takes place upon the sole evidence of the person aggrieved, then it shall be paid over to the overseers of the poor."

Now, these two Acts are *in pari materia*, and almost identical in their language. Upon the English statute it has been decided in *Rex v. Harpur* (1 D. & Ry. 223) that a conviction, whereby one Elizabeth Harpur (who was charged with cutting, spoiling, taking, and carrying away a post out of a fence) was convicted of "wilfully and maliciously carrying away the post," was bad, because the conviction charged no offence. This is a conclusive authority upon the present case. Here there is no offence charged: the taking and carrying away windows out of a house is not an offence. The offence pointed at in the Act is the "wilfully or maliciously committing any damage, injury or spoil upon any real or personal property." No property, real or personal, is alleged in the conviction to have been damaged, injured or spoiled: all that is alleged is the *taking and carrying away* of a chattel, which is no offence. So also, in this conviction, it is not found that damage to any amount has been done to any property, which, as it appears to me, where a private person is the complainant, is as necessary to appear upon the conviction as that the offence charged is within the Act. The conviction should clearly shew whether the damage, injury or

spoil complained of, is done to real or personal property, stating what property, and what is the amount which the Justice has ascertained to be reasonable compensation for such damage, injury or spoil : *Rex v. Harpur, supra* ; *Rex v. Barnaby* (2 Ld. Raym. 900).

The rule must be absolute for quashing the conviction.

Rule absolute to quash conviction.

PATERSON V. PYPER.

Interpleader—Mortgagor and mortgagee—Fixtures.

A. owns term, with right of purchase, builds water-mill on premises, and mortgages to B. for present and future advances ; afterwards introduces steam power, consisting of engine and boiler, into the mill, affixed as under ; subsequently an extension of the term to B., the mortgagee, with right of purchase, is obtained from reversioners by deed, to which A. and B. are parties, reciting their position :

Held, that the steam power belonged to B., as mortgagee, and could not be seized under execution against A., though they might be trade fixtures, and though the estate mortgaged was not a freehold interest.

INTERPLEADER as to an engine and boiler seized by the sheriff of Huron under a *fi. fa.*, at suit of defendant Pyper, against Samuel Platt, tested 25th June, 1869.

The case was tried at Goderich, before Hagarty, C. J.

It appeared that on 4th July, 1859, the Buffalo and Lake Huron Railway Company leased a piece of land in Goderich to Platt, the execution defendant, with certain water rights, for seven years, lessee covenanting to erect a mill, with right of purchase for \$5000 any time during the term ; but if he did not purchase, then all improvements and fixtures to form part of the freehold, and revert to lessors.

On 1st October, 1864, Platt mortgaged the premises to plaintiff, Paterson. The deed recited previous advances and mortgages, and that in all he then owed plaintiff's firm \$21,000, and required further advances ; then he mortgaged

the lease, right of possession, and property, as collateral security for some due and future advances, with proviso for redemption twelve months from time of advances, on payment of present debt and future advances; covenants to insure present and future buildings, with power of sale on default.

On 9th November, 1866, by deed, to which plaintiff, Platt and the Railway Company were parties, reciting the first lease and the assignments to plaintiff by Platt, as collateral security, as therein mentioned, and that by deed-poll of 11th July, 1864, reciting the lease and assignments, Platt had authorized plaintiff to enter upon and take possession of the premises, and to receive a deed therefor from the Railway Company, and that a further term was desired, a new term of three years, from 1st July, 1867, was granted by the Company to plaintiff, subject to all the conditions in the original lease, including the right of purchase; covenants by plaintiff to pay rent, taxes, and to repair.

Platt proved he had built the mill, and had run it for several years by water power; that in winter the ice interfered with working, and in 1868 he put in an engine and boiler for steam power, which was used when water failed; the boiler was placed outside the walls; sunk eight feet in the ground, and then laid in stone work built up about a foot above the ground. The engine rested on and was bolted in timbers, let about five feet into the ground and bolted together, and the shaft ran through the stone wall of the mill, three feet below surface of ground, coupled with gearing, and working same machinery as before; engine weighed four tons, boiler six tons; it might take a month for four or five men to put in or remove engine and boiler; he hoped to purchase, and would not have put them in but with that hope; he considered he ought to have steam power to make the mill profitable; the farmers round had subscribed to help to put in the steam power; it cost \$5000, and \$1000 for putting it in; to remove it elsewhere might cost \$3000; if removed it would injure

the capacity of the mill; he owed plaintiff \$15,000 on the mortgage; he only ran the mill by steam three or four days when plaintiff took possession, and put one Bennett in charge, who ran the mill nearly a year.

One Beckett furnished the steam power, and Platt gave him a chattel mortgage on it for a year, which had expired, and it was not refilled. When Bennett took possession there were several executions out against Platt. In Spring of 1859, Beckett came up, and commenced forcibly removing the steam power, plaintiff being then in possession. The sheriff stopped him by seizing on the present defendant's execution. Beckett swore that he could have removed the steam power without injuring the building.

For defendant it was contended that plaintiff had only a chattel interest, not covering chattels subsequently put in; 2nd, That the Railway Company would own it as part of the realty; 3rd, That it belonged to Beckett.

The case was tried without a jury, and the Judge found for plaintiff, with leave to defendant to move to enter verdict for him, if Court should think him entitled to succeed on the evidence.

In Michaelmas Term, *Richards*, Q.C., obtained a rule on the leave reserved, on the ground that the property in issue was chattel property, and not the property of plaintiff; that if it ceased to be chattel property, it became part of the realty, and would belong to the owner of the freehold, and not to plaintiff.

Robinson, Q.C., shewed cause, referring to *Climie v. Wood*, L. R. 3 Ex. 257, S. C. L. R. 4 Ex. 328; *Hitchinson v. Walter*, 4 M. & W. 409.

Richards, contra.

HAGARTY, C. J., delivered the judgment of the Court.

At the argument Mr. Richards suggested that Platt was only a tenant of plaintiff, and as such entitled to the steam power as tenant's fixtures.

Nothing of the kind was suggested at the trial, nor is it

stated in the rule, and Platt's evidence wholly rebutted any such assertion. He fully explained his position as mortgagor, and the deeds in evidence are quite consistent with his holding such position. The renewal lease to plaintiff, to which Platt was a party, recites the true position of the parties, and Platt's assent to the lease being renewed to plaintiff, with the right of purchase. It shews the mortgage to plaintiff by Platt, as collateral security, and that Platt had authorized plaintiff to enter and take possession, and to take the deed therefor from the Company. A few days after the steam power was put in, plaintiff took possession and, by Bennett, ran the mill for nearly a year, when seizure made on defendant's execution.

It appears to us that the position of plaintiff and of Platt was clearly that of mortgagor and mortgagee, and that the mortgagee was in possession when this seizure was made.

In *Olimie v. Wood* (L. R. 3 Ex. 260) Kelly, C. B., says: "It is a case between mortgagor and mortgagee, and no authority has been cited to shew that a mortgagor is entitled to remove such trade fixtures. * * A mortgage is a security or pledge for a debt, and it is not unreasonable, if a fixture be annexed to land at the time of the mortgage, or if the mortgagor in possession afterwards annexes a fixture to it, that the fixtures shall be deemed an additional security for the debt, whether it be a trade fixture or a fixture of any other kind. * * * It follows from this that the finding of the jury, that the steam engine and boiler were fixed by the mortgagor for their better use, and not to improve the inheritance, and that they could be removed without any appreciable damage to the freehold, becomes immaterial, for the right of the mortgagee attaching by reason of the annexation to the land, the intention of the mortgagor in respect of them cannot prevail against the legal operation of the deed."

This case is affirmed in *Error* (L. R. 4 Ex. 328). Willes, J., says, "We are of opinion that the decisions which establish a tenant's right to remove trade fixtures, do not

apply as between mortgagor and mortgagee any more than between heir-at-law and executor."

A question is raised here, whether this rule applies where the mortgagor has not the freehold, but only a term.

Ex parte Astbury (L. R. 4 Chancery App. 637) is express on this point. Gifford, L. J., says: "I cannot agree to the suggestion of Mr. Jessel that, because the mortgagor in this case was a leaseholder, and not a freeholder, the articles which are fixtures will not pass to the mortgagee. Whether he is a freeholder or leaseholder the same rule clearly and indubitably would apply."

In our case, although in one sense only a term of years, it is by contract capable of being turned into a fee simple.

Culwick v. Swindell (L. R. 3 Eq. 249), before Lord Romilly, following *Ex parte Cotton* (2 M. D. & D. 725), also is to the effect "that trade fixtures put up for the purpose of carrying on the business, and although put up since the date of the mortgage, so far as they are affixed to the freehold, go with it to the mortgagee."

In short, as is said in *Climie v. Wood*, "the old maxim, *quicquid plantatur solo, solo cedit*,' applies in all its integrity to the relation of mortgagor and mortgagee, and trade fixtures constitute no exception."

I also refer to *Longbottom v. Berry* (5 Q. B. 123).

The objection taken at the trial, as to Beckett's right to the steam power, was not urged in argument. It could not have been relied on.

We think the law is clearly with the plaintiff, and that the verdict was right.

Rule discharged.

MYLES V. MONTREAL INSURANCE CO.

Marine insurance—Unseaworthiness—Evidence—New trial.

In a marine insurance policy issued by defendants to plaintiff, among other excepted perils or losses, were those arising from rottenness, inherent defects, and other unseaworthiness. At the trial it appeared from plaintiff's own evidence that the vessel in question, after sailing all day on a summer sea, with a light breeze, in the evening suddenly came up into the wind, or broached to, refused to answer her helm, and at once began settling down, when the crew abandoned her, and after they had rowed about thirty-five yards she sank. The master could give no reason for this, nor was any evidence offered in explanation of it, while the evidence for the defence went to shew that she was old and rotten in parts; that she in fact leaked before starting across the lake, in the canal and at the port of lading, and that men would not go in her without being paid extra wages, and the plaintiff himself stated that she was old and he had given instructions not to canal her by night or leave port in a gale. A diver, who examined her, also found one stave wholly out and another partially so. The whole case having been left to the jury on this evidence,

Held, that the learned judge should have ruled according to *Coons v. Aetna Ins. Co.*, 18 & 19 C. P. 305 and 235, and if plaintiff declined a nonsuit, should have explicitly told the jury to find for defendants; and a new trial was, therefore, ordered.

This was an action to recover the amount of a marine policy for \$2000 on the schooner "Garryowen," the declaration averring total loss.

Pleas—1. *Non est factum*. 2. Setting out the perils insured against in policy, which excepted perils, losses or misfortunes "arising from or caused by the following or other legally excluded causes for damage that may be done by the vessel, hereby insured, to any other vessel or property, from the incompetency of the master or insufficiency of the crew, or from the want of ordinary care and skill in loading and storing the cargo of said vessel; from rottenness, inherent defects and other unseaworthiness; from theft, barratry or robbery: averment, that such schooner was not lost by reason of the perils insured against, as in the declaration alleged.

3rd plea, that policy was subject to the exceptions in the 2nd plea mentioned, and that said schooner was lost by perils so excepted in and by said policy.

Issue.

The case was tried at the last Fall Assizes at Toronto, before Wilson, J.

James Hughes, master, deposed that the "Garryowen" left Toronto in June last with a load of lumber for Buffalo, then went to Cleveland and loaded with coals; left Cleveland on evening of 30th June, about 6 p.m., with a fresh breeze and considerable of a sea on; about 10 p.m. wind shifted and there was a bad cross sea; one pump choked, and they did not get it clear till next morning; they were able to keep the water down; pumped all next day till 8 p.m.; men were tired out; witness went below to rest; about 9 p.m. he came on deck, and was told that water was not gaining, and there was none to be seen in the fore-peak; the vessel came up in the wind; they tried to back her off; she lay without a move; he looked over the side, thinking it strange, and saw she was settling down; they got the boat out, got in, and when they were thirty-five yards from her she heeled over to port, lay on her beam-ends and went down; the crew pulled ashore.

On cross-examination he said she had been caulked in June; did not make more water than a ship of her class would; she made eighteen inches when they reached Port Dalhousie; could pump her dry in one and-a-half hours; her load of coal was not too heavy; the night she left Cleveland she laboured a good deal and her best pump became choaked; could not keep the water from gaining with the other pump; next morning about eighteen inches of water in fore-peak; reduced it about an inch every half-hour; the wind was light during the day of 1st July; three or four mile breeze; thought she must have sprung a leak when she broached to, to sink so suddenly; the fore-peak leak not sufficient to account for it.

This was the plaintiff's case.

A nonsuit was moved, on the ground that seaworthiness not shewn, nor a loss by perils insured against; no storm or other cause for her sinking as she did, and the presumption was she was not seaworthy.

For the plaintiff it was urged that she broached to in a

wind and went down, and that unseaworthiness, as within the exception, should be shewn by defendant.

The learned judge ruled that it was for plaintiff to prove loss by perils insured against, or, in other words, seaworthiness, and the case as to that was very weak, but he was not prepared to say there was no evidence, and the case must go to the jury.

For defence one Dollinson swore to a direct charge against Hughes, the master, of his knocking out the stave-port of the vessel just before she sank that evening, and his wife, who was cook on board, gave some corroboration to his story.

Curry, the mate, swore she had to be pumped much from Toronto to Port Dalhousie, and through the canal; that the after-pump was never fit for use; that she was old, and men would not go in her without higher wages; did not leak much from Buffalo to Cleveland; weather was squally on the way to Cleveland; ribs of vessel all decayed, bolts and pikes sticking through, no wood round them; all the day of 1st July weather calm; at 8 p.m. pumps sucked; soon after she came up in the wind; witness heard water rushing in like a great fall; they got into the boat; she went down nine or ten miles from shore; nothing in the weather to account for her sinking; no good vessel would leak in such weather.

Other evidence was given much to the like effect; that she leaked in Toronto, and across the lake, and in the canal; again in Cleveland, when loaded; nothing of bad weather; all 1st July very fine, and so at time she sank.

The plaintiff was called, and he said she was an old vessel, and he had given directions not to canal by night or leave port in a gale. He had insured her in previous years at 7 or 8 per cent., in 1869 at 10 per cent., and defendants' agent, in 1869, told him the inspector had reduced her class.

A diver proved having examined her after the sinking, and found the starboard stave-port wholly out, and that to larboard started five-eighths of an inch.

The whole case was left to the jury.

The learned judge noted that "she was lost in fine weather, when no other cause can be assigned for her going down than such as leads to the conclusion that it was from her defects and unseaworthiness."

The question of barratry was also left to jury.

The jury found for plaintiff, \$2000.

M. C. Cameron, Q.C., obtained a rule for a new trial, for misdirection in leaving it to jury to say whether the loss was occasioned by the perils insured against, instead of telling them there was no evidence of loss by perils insured against; and on the law, evidence, and weight of evidence; and for telling the jury to find for plaintiff on the second plea, instead of leaving it to them as a question of fact, whether the vessel was lost by perils insured against.

C. S. Patterson shewed cause, citing *Coons v. Aetna Insurance Co.*, 18 C. P. 305; *Bishop v. Bentland*, 7 B. & C. 219; *Dixon v. Sadler*, 5 M. & W. 405; *Redman v. Wilson*, 14 M. & W. 476; *Gordon v. Rimington*, 1 Camp. 123; *Hayman v. Parish*, 2 Camp. 149; *Clifford v. Hunter*, 3 C. & P. 16.

Cameron, contra, cited *Powell v. Hyde*, 5 E. & B. 607; *Parke v. Potts*, 13 Dow, 23.

HAGARTY, C. J., delivered the judgment of the Court.

We think the verdict rendered for the plaintiff cannot be supported. Until a higher Court shall have pronounced the case of *Coons v. The Aetna Insurance Company*, twice decided in this Court, to be erroneous, we are bound to follow its plain enunciation of the law.

In that case, a vessel left Toronto on a fine day; she had been leaking the night before, but not much, if at all, when starting; on her way to Port Dalhousie, soon after starting, she leaked, and when about five hours out she sank. She was a steamer, a tug; it was said that the leak was in the stuffing-box; it was suggested that the work-

ing of engine might have caused it, or a plank might start in calm weather from being unsound or badly fixed, and that new ships might leak.

In the judgment of the Court is cited the language of Cockburn, C. J., in *Paterson v. Harris*: "The wear and tear of the ship, the decay of her sheathing, the action of worms on her bottom, have been properly held not to be included in the insurance against perils of the sea, as being the unavoidable consequences of the service to which the vessel is exposed; the insurer cannot be understood as undertaking to indemnify against losses which, in the nature of things, must necessarily happen."

Then, in the case in judgment, the Court said: "The issue was, whether the loss happened from unseaworthiness. The evidence shewed a case which, *primâ facie*, shewed unseaworthiness, and it was not explained or rebutted. The defendants were not obliged to prove it affirmatively, in the absence of all evidence to make out a *primâ facie* case, and for this reason the defendants were entitled to a nonsuit."

The case again appears in 19 C. P. 235, and the authorities are reviewed. The language of Lord Eldon in *Watson v. Clark* (1 Dow. H. L. 344) is cited: "When the inability of a ship to perform her voyage became evident in a short time from the commencement of the risk, the presumption was that it was from causes existing before her setting sail on her intended voyage, and that the ship was not then seaworthy, and the *onus probandi* in such a case rested with the assured;" and again, Hildyards, Edition of *Park on Insurance*, Vol. I. 469: "If a ship sail upon a voyage, and in a day or two becomes leaky and founders, or is obliged to return to port, without any storm or visible or adequate cause to produce such an effect, the presumption is that she was not seaworthy when she sailed, and the jury, upon the plaintiff's own case, may draw such a conclusion."

In the voyage policies seaworthiness is an implied warranty: here it is expressly provided for.

There is nothing in the present case shewing any special contract with the underwriters in any way varying or limiting the express language of the policy, as in the cases cited in *Coons v. Aetna Company*.

It is impossible to read the evidence in this case, even if we heard nothing but the master's testimony, and hold otherwise than that the manner of the loss made it incumbent on plaintiff to give some reason for such an extraordinary event. A vessel, sailing all day on a summer sea, with a light breeze, in the evening suddenly comes up into the wind, or broaches to, she will not answer her helm, and rapidly settles down, the crew get into the boat, and when they have rowed thirty-five yards from her, she sinks. The master can give no reason for all this: the coming to in a smooth sea can be no reason for planks starting, &c. Then, the witnesses called for the defence are wholly uncontradicted as to their account of the voyage and its strange termination. The vessel was said to be old, and rotten in parts. The whole evidence went to prove unseaworthiness.

It is difficult to form any other opinion (apart from the charge of barratry) than that the vessel sank from inherent defects; that, in Sir A. Cockburn's words, it was a loss which, in the nature of things, must have happened some time or other; just as a vessel, when her strength is at last worn out, her course of usefulness over, dies, as it were, from old age and exhaustion. Such a loss is certainly not covered by the policy.

It seems impossible to distinguish this case from that of *Coons v. Aetna Insurance Company*. We think the learned Judge should have ruled according to that case, and if the plaintiff declined a nonsuit, should have explicitly told the jury to find for defendants.

We have not discussed the evidence as to the alleged wilful sinking of the ship by the master. If this really took place, it would be difficult to absolve the plaintiff from being privy thereto. No motive whatever is suggested on the master's part to commit so vile an act merely on his own suggestion.

If the case turned merely on this point, we perhaps would pause before putting the plaintiff through the ordeal of another trial, after being acquitted of a charge so serious. We should have had to consider how far the case of *Gould v. British America Assurance Company* (27 U. C. 473), and the cases there cited, should govern our decision.

Although the rule here was taken out to enter a nonsuit on leave reserved, we can find no such reservation in the notes.

The plaintiff may most probably desire the opinion of the Court of Appeal on the law, as here laid down, before going again before a jury, where this decision will necessarily govern. If so, it can be considered that the leave was so reserved, and then the case can be appealed.

New trial, without costs.

MCCOLLUM V. ÆTNA INSURANCE COMPANY.

Marine policy—Loss payable to another, and action by him—Nonsuit.

A marine policy was in this form: The Ætina Insurance Co., of, &c., on account of Alfred Coons, loss, if any, payable to Lachlan McCollum (the plaintiff) in gold, do make insurance, &c. :

Held, that the contract on this policy was entered into with Coons, and that making the loss payable to McCollum did not make him the party insured; and therefore *Held*, that in an action upon it by McCollum he was properly nonsuited.

Semble, that the insertion in the policy of the words "for or in the name of all persons interested, &c.," or "for whom it may concern," would have enabled McCollum, on shewing interest, to recover; also, that the words, "as broker" or "as agent," following after Coons' name, would have let in parol evidence to shew the interest and right of an undisclosed principal, who could have sued on the policy.

THIS was an action on a policy of insurance, the declaration stating that defendants, by policy dated 30th March, 1867, did make, insure, and the plaintiff did thereby cause himself to be insured by the defendants, in the sum of \$5,000 (it being thereby declared that the loss, if any, should be paid to the plaintiff in gold), upon the body,

tackle, &c., setting out a loss by perils insured against, with an averment that "the plaintiff, at the time of the making of said policy, and from thence until and at the time of the loss, was interested in the said tug or vessel and premises to the amount of all the moneys so insured thereon.

The only plea material to notice was *Non est factum*.

There was no traverse as to plaintiff's interest.

The case was tried at Cayuga, before Wilson, J.

When the policy was produced it was in this form:—
"The Ætna Insurance Company of Hartford, Connecticut, on account of Alfred Coons, loss, if any, payable to Lachlan McCollum in gold, do make insurance, and cause \$5000 to be insured upon the body, tackle, and other furniture of the tug called the "R. L. Howard," from noon of 1st April, 1867 (the said vessel being warranted by the assured to be then in safety), to noon of the 15th December, 1867, unless sooner made void by conditions hereinafter expressed. Warranted by the assured to be, &c., &c."

No other name of any one, as the party assured, again occurred, but the name "the assured" occurred many times in many stipulations.

On objection taken, that the present plaintiff could not maintain the action, the learned Judge directed a nonsuit.

In Michaelmas Term last, *Harrison*, Q.C., obtained a rule to set aside the nonsuit, to which *Anderson*, this Term, shewed cause, citing *Every v. Provincial Insurance Co.* 10 C. P. 20; *Orchard v. Ætna Insurance Co.*, 5 C. P., 445; *Arnould* on Marine Insurance, 21.

Harrison, Q.C., contra, cited *Sutherland v. Pratt*, 12 M. & W. 16; *Sunderland Marine Co. v. Kearney*, 16 Q. B. 935, 938; *Gresty v. Gibson*, L. R. 1 Ex. 112; *Reaves v. Watts*, L. R. 1 Q. B. 412; *Notman v. Anchor Insurance Co.*, 4 Jur. N. S. 712.

HAGARTY, C. J.—The question for us is whether this plaintiff can recover in his own name.

As the policy reads, it appears to me to be a contract with Alfred Coons, who is the party assured. If the common clause in English marine policies, after Coons's name, had been inserted, "for and in the name of all persons to whom the same doth appertain in part or in all," it would enable plaintiff to sue, on averment and proof of interest, and without reference to his name appearing in the policy.

In the United States the words are "for himself and whom it may concern." In *Arnould* on Insurance, I., sec. 19, it is said: "The insertion of this clause, which is introduced into all our common printed forms of policy, is of great importance, as without it no one could take advantage of the policy except the party expressly named in it; but by the aid of this clause any party may avail himself of the policy who can prove that he was really interested in the subject matter of the insurance during the risk and at the time of the loss, and that he was the person upon whose account the insurance was *bonâ fide* intended to be made."

In the American notes to this section of *Arnould* it is said, "But if there be no general clause, the policy will be applied only to the interest of the party named." Again, in the notes to page 170, "If the party effecting the insurance describes himself as agent, without any more particular description, parol evidence is admissible to shew for whom the insurance was really intended, in the same manner as if the policy had contained the usual clause, 'on account of whom it may concern.' But when the person effecting the insurance describes himself as the agent of a particular person, the policy, by its necessary construction, enures only to protect an interest of the party thus named as principal."

Orchard v. this Company (5 C. P. 445). The actual words in the policy are not given in the report: it is said to be by defendants on account of Captain Fellowes, and, in case of loss, to be paid to T. C. Orchard (the plaintiff). Macaulay, C. J., after reciting the policy, says, as to loss being payable to plaintiff, "I think that can only mean

to be paid to him as agent for and on behalf of Fellowes, and not as being himself the party assured." He held that Orchard had no insurable interest, and that the action failed, though Fellowes might sue. The counsel for defendants noticed, in argument, that the policy was not made on behalf of all concerned; but the point is not noticed in the judgment.

In *Every v. Provincial Insurance Co.* (10 C. P. 20) the policy declared that defendants did insure George A. Vaughan & Co. against loss or damage on their stock of goods, loss, if any, payable to Every and McPherson (the plaintiffs). Interest was averred in plaintiffs. On demurrer it was held the action would not lie. Draper, C. J., says: "The plaintiffs * * contend that the words loss, if any, to be paid to them, enable them to sue upon a contract the first line of which contains an undertaking by defendants that they insure Vaughan & Co. I regard the averment of the plaintiffs' interest as immaterial, for that is not enough singly. The possession of an insurable interest must be coupled with a contract of insurance between them and the assurers." The learned Chief Justice reviews the case of *Orchard v. Aetna Co.*, and says: "The alternative proposition of Macaulay, C. J., 'or the person beneficially interested in the assurance in a way that entitles him to sue upon the policy,' has reference, I apprehend, to marine policies only which contain the general clause above set forth."

A case, cited by Mr. Harrison, of *Sunderland Marine Insurance Co. v. Kearney* (16 Q. B. 937), contains some expressions in Lord Campbell's judgment somewhat favorable to the idea that any one interested can sue on a marine policy, named or not; but no special reference is made throughout the case to the absence or presence of the general words, nor was the point taken by the underwriters. The action was by Kearney and Noonan (plaintiffs). The policy stated that Kearney had represented to the Company that he was interested in or duly authorized, as owner, agent, or otherwise, to make the assurance. Lord

Campbell says, "Kearney is not represented by the policy as the only person with whom the Company contract." He then notices the words above given, and says, "Although he had such authority, there was nothing to prevent the Company from entering into a covenant to pay the loss to the persons who were actually interested in the subject matter insured, and on whose account the policy was made."

The passage cited from the American notes to Arnould (page 170), as to admitting parol evidence to shew for whom the insurance was really intended, when the assured merely describes himself his agent, would support Lord Campbell's decision. The case involved many other points, and it was conceded that the objection urged was only tenable on a policy by deed.

In *Phillips on Insurance*, Vol. I., sec. 28, 4th edition, it says: "The party insured is most frequently named in the policy, but not always, for it may be made by the party named for his own benefit, and is often made by him as agent or trustee, in which case the party interested is named, or, if not, the agent describes himself to be such, or the policy is declared to be made for the benefit of whom it may concern, or contains some indication of the interest of another party than the one named." Again: "Insurance made by a person in his own name only, without any indication in the policy that any other is interested, can be applied only to his own proper interest in the subject, or his interest as trustee, &c.; in other words, a contract with A. cannot be construed to be a contract with B."

In *Bell v. Gilson* (1 B. & P. 352) Buller, J., says, "Here it is expressly said in the policy that B. & Co. effected the policy 'as agents,' by which it is imported that they acted not on their own account, but on the part of somebody for whom they were concerned."

Graves v. Boston Insurance Co. (2 Cranch, 221, in 1805), C. J. Marshall notices the then state of the law, and is in accord with the views in the American edition of Arnould.

Turner v. Burrows (5 Wendell, 541) is to same effect; and in *Finney v. Bedford Insurance Co.* (8 Met. 350): "The appropriate form of the policy is 'for himself and other owners, or for whom it may concern, indicating the insurance is to embrace an interest beyond that of the party in whose name the policy is issued. Such words, or equivalent ones, being introduced into the policy, the rules of law then authorize extrinsic evidence as to the persons who are parties in interest, and who may enforce their claims upon such policy, though not particularly named therein."

I am of opinion that defendants' contract on this policy was entered into with Alfred Coons, and that making the loss payable to McCollum does not make him the party insured. The point requiring the most consideration, and that most favorable to the plaintiff, is quite irrespective of this statement that the loss should be payable to him.

I think the argument in his favor, as a party interested, would be just as forcible if these words were omitted.

The result of the many authorities that I have examined is, in my judgment, that the contract is with Coons alone. Had the general words "for or in the names of all persons interested," &c., or "for whom it may concern," been inserted, I think a person shewing interest could sue."

I also think that if, after Coons's name, the words, "as broker," or "as agent," had been inserted, parol evidence would be admissible to shew the interest and right of an unnamed principal, who could sue on the policy; but, in the present case, I think our judgment must be for defendants. This judgment exactly follows *Every v. Provincial Insurance Co.*, in this Court. That, although the case of a fire policy, elicited a strong opinion from the Court as to the law applicable to a marine policy.

The only case in which I have met words like those here, as to the loss being payable to another person named, is *Rider v. Ocean Insurance Co.* (20 Pick. 259).

GWYNNE, J.—In my opinion, the words "loss, if any, payable to Lachlan McCollum in gold," do not import that

Lachlan McCollum was *the* person, or *a* person interested, on whose account the policy was effected. The policy must, in my opinion, be construed as itself declaring that the Company do make insurance and cause \$5000 to be insured on the vessel on account of Alfred Coons *alone*, and he being declared to be the only person on whose account the policy is effected, evidence cannot be admitted to establish that in fact it was entered into, as alleged in the declaration, upon account of the plaintiff. The plaintiff therefore was rightly nonsuited.

GALT, J., took no part in the judgment, having been concerned in the case at the Bar.

Rule discharged.

MCKINDSEY V STEWART.

Promissory note—Indorsement in fraud of maker after payment—Payment to indorsee under pressure of judgment—Right to recover back from indorser under common count for money paid to his use.

Defendant held the joint and several note of plaintiff and one Bastedo, as security for the debt of the latter, after payment by whom, unknown to plaintiff at the time, he indorsed it to one White, who sued plaintiff, and under pressure of judgment obtained payment from him of the amount covered by it:

Held, that the money paid to White by plaintiff was money paid to the use of defendant, from whom plaintiff could, therefore, recover it back in this form of action.

This was an action on the common money counts for money paid and money had and received. The only plea was never indebted. The action was tried before Galt, J., at the last Fall Assizes for the county of Halton. It appeared in evidence that on 12th November, 1861, the present plaintiff made a joint and several note with one Bastedo (since deceased), to the defendant, for the sum of \$280, payable one year after date. The plaintiff, although a joint maker, was only a surety for Bastedo, and up to the time of the latter's death never paid

any thing on account of the note, nor did it appear that he was ever called upon to do so. Bastedo died on the 3rd August, 1868. After his death the defendant endorsed the note to one White, who brought an action upon it and obtained judgment against the plaintiff, under the pressure of which plaintiff paid to White the sum of \$280, being the principal of the note, and \$1.50 interest. For some reason, not explained, the judgment was for the face of the note only. From the evidence given on the trial of the present suit it was shewn that on the trial between White and McKindsey, which took place in December, 1868, the present defendant was called as a witness on behalf of the then defendant, and that he then stated that before he transferred the note to White he had never received any payment on account of the note, either principal or interest.

Some time after the trial a receipt was found among Bastedo's papers in the following terms, "Milton, April 14, 1867, Received from G. T. Bastedo the sum of three hundred dollars on a note I hold against him and G. C. McKindsey," signed by the defendant. Upon the discovery of this document the plaintiff brought this action to recover the money which he had been compelled to pay to White, through the fraud of the defendant. At the trial it was not disputed that the note referred to in the receipt was the same, but the contest between the parties was whether the above receipt had been signed by the defendant, or whether it was a forgery. The jury found a verdict in favour of the plaintiff.

In Michaelmas Term last, *McMichael* obtained a rule to set aside the verdict, and to enter a nonsuit, pursuant to leave reserved at the trial, for a new trial on the law and evidence, and for misdirection in leaving the question to the jury without directing them that the money having been paid under legal process, and the question of payment of the note having been tried and disposed of in the action under pressure of which the money was paid, an action for

money had and received could not lie, and in not telling the jury that by the evidence it appearing that the note sued on, in the case of *White v. McKindsey*, was not fully paid, the action thereon was properly maintainable, and money paid by the plaintiff in that action could not be recovered in this, and in not telling them that an action for money had and received, or money paid, was not sustainable under the evidence.

Harrison, Q. C., shewed cause, citing *Bleaden v. Charles*, 7 Bing. 246; *Bradshaw v. Bradshaw*, 9 M. & W. 291; *Smith v. Cuff*, 6 M. & S. 160; *Heston v. Riley*, 11 M. & W. 492; *Hawley v. Beverley*, 6 M. & G. 221: *McIntosh v. Jarvis*, 8 U. C. 535; *Follett v. Hoope*, 5 C. B. 226.

McMichael, contra, cited *Marriott v. Hampton*, 7 T. Rep. 269, contending that the count for money paid could not be sustained on the evidence, nor could that for money had and received, and that as the payment made by the plaintiff was under pressure of a judgment, it could not be recovered in any form of action.

GALT, J.—I am of opinion that the defendant's contention is right, as regards the count for money had and received, for it certainly cannot be said that when White bought the note from the defendant the money then received as the purchase money was received to the use of the now plaintiff, nor can it be considered that when White received the proceeds of his judgment he received it for and on account of either the present plaintiff or defendant. I am also entirely of opinion that where money has been paid by the plaintiff to the defendant, under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received, or in any other form of action, because, as laid down by Lord Kenyon in *Marriott's* case, "after a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person;" consequently, supposing that this had been an action to recover from Mr. White the money paid to him,

I have no doubt that it must have failed. But, in my opinion, this is not a case of that description; it is an action, in its circumstances, very similar to *Bleacden v. Charles*. In that case the defendant held a bill of exchange, which he had originally received *bondâ fide* as security for a debt, but which, after the debt had been paid, he endorsed to one Henderson, to whom he was indebted, in favor of the plaintiff, and Henderson sued the plaintiff, who was therefore obliged to pay the bill and the costs of the action.

In the present case the defendant held the note made by the plaintiff as security for the debt due by Bastedo, and, after Bastedo had paid the debt, endorsed it to one White, who sued the plaintiff, and the plaintiff was compelled to pay it, with costs. In the case of *Bleacden v. Charles*, it is true, the defendant had received credit for the amount of the note in his account with Henderson, whereas in the present case the defendant had endorsed the note to White, and as such was liable to him as an endorser, consequently any payment made by the plaintiff was in discharge of the defendant, because, supposing White to have compelled him to pay as endorser, he could have sustained no action against the plaintiff, for the reason that the note had been already paid by Bastedo to him. I am, therefore, of opinion that the money paid to White by the plaintiff was money paid to the use of the defendant. The endorsement, as appears on the note, was in the usual form; there was nothing to shew that the defendant was not to be personally liable as an endorser. This disposes also of that part of the rule which refers to any balance remaining due on the note after the payment of the \$300 by Bastedo. The defendant had transferred all his interest in the note to White, and could himself have made no claim against the plaintiff, and as the amount recovered by White was less than the defendant had received, we can see no reason why he should complain; for the plaintiff would have been entitled to recover from him any sum which he might have been compelled to pay to him, to the extent, at any rate, of the \$300 and interest.

HAGARTY, C. J.—In the absence of any thing to the contrary, I think we are to assume that Stewart endorsed the note in the usual manner to White, remaining liable to the latter as endorser. This was some time after maturity. Any payment made by the makers to White would of course be in discharge of the latter's claim on Stewart. When Bastedo paid the \$300 Stewart was the holder. The subsequent transfer to White was therefore a fraud upon the makers, at least, to the extent of \$300. When White sued the surviving maker, the latter, had he then access to or knowledge of the receipt given by Stewart, could have successfully resisted payment to that extent. He was defeated, and compelled to pay White. It was not proved whether judgment had been entered in White's suit.

I have hesitated much as to the right now to recover this money, as it seemed to me, at first, to be in effect trying again the issue of payment or no payment of this money, and I feel the extreme inconvenience of opening such a question after judicial determination; but, on reflection, I think that plaintiff is not concluded, as against Stewart, by the result of the White suit. If Bastedo had paid this money to Stewart a few days before the note matured, without taking it up, and Stewart endorsed it over for value to White before maturity, the latter, unaware of the payment, could of course recover from the maker, and the maker's remedy would, I think, be clear to recover the amount paid to White as money paid to Stewart's use, and in relief of his endorsee's claim on him.

It might easily occur, in a case like this, that even if the note had been in fact endorsed over to White after maturity, yet the maker might fail to prove that it was so, and so fail in establishing his defence of payment on that ground; or, as it might also happen, fail, in the first illustration, to prove that White, when he took the note, had notice of the previous payment.

In such cases as those suggested, I think, the maker could obtain redress in this form of action from Stewart.

My brother Galt has fully extracted the case of *Bleaden v. Charles*. The subsequent case of *Asprey v. Levi* (16 M. & W. 851) reviews it, adopts it as good authority on its facts, but refuses to apply it to the facts of the later case. The learned Barons see a clear distinction between the authorities: it requires a close examination to appreciate its force.

Pownall v. Ferrand (6 B. & C. 439) supports *Bleaden v. Charles*.

Had Stewart sued the surviving maker, and recovered on issue joined of payment, no subsequently discovered evidence could enable the maker to get back the money as money received to his use. The matter would have become *res judicata* and could not be re-opened. This question is very fully discussed in the commentary on *Marriott v. Hampton*. Were it otherwise, no judgment would be really final.

But the legal proceedings between White and McKindsey will only estop the parties to that contest. We are not to extend the conclusion for Stewart's benefit; the truth can, I think, still be enquired into between them. We can uphold the verdict on the evidence, as presented to us without violating any settled legal principle.

GWYNNE, J.—I am also of opinion that the plaintiff is entitled to retain his verdict.

When Bastedo paid the note, as the jury have in effect found that he did, the note, although remaining in defendant's hands, was *functus officio*, and there arose an implied agreement between Bastedo and Stewart that the latter would not put it into circulation, and the plaintiff, as Bastedo's security, was entitled to the benefit of this agreement. When then Stewart afterwards put the note in circulation, by endorsing it to White, he committed a fraud upon this implied agreement, and upon McKindsey, who, as it appears, being ignorant of the fact of the payment of the note by Bastedo, had no effectual defence to offer to White's action. Stewart, by his endorsement, was liable

to White upon the note, whether it had or had not been paid by Bastedo. When therefore the present plaintiff paid White, the payment so made was compulsory, induced by a fraudulent act of the defendant, committed in violation of the implied agreement not to put the note into circulation after it was paid, and the money so paid by the plaintiff was money which the defendant was liable to pay to White, and the defendant has had, therefore, full benefit of the payment. Herein, as it appears to me, concur all the elements which give rise to the implied assumpsit to repay money paid by one person to the use of another. The only answer offered is, that the plaintiff cannot recover back money paid by him to White under process of law; but he is not seeking to recover back such money. The principle invoked does not apply where the transaction is *res inter alios acta*. The plaintiff's cause of action here is not that he was wrongfully compelled to pay White a sum which he was not legally liable to pay, and which therefore he seeks to recover back from White; but, as it appears to me, it may be expressed to be that the defendant, having fraudulently put the note in circulation after it was paid, in violation of the implied agreement not to do so, is estopped now from denying that the makers of the note, so re-issued, were from thenceforth accomodation makers for *him*, so as to make the payment by one of them to defendant's indorsee a payment to defendant's use in discharge of *his* liability involved in that endorsement.

Rule discharged.

WADE V. BALL ET AL.

Attorneys—Negligence—New trial.

Plaintiff having sued and obtained a verdict against defendants, for alleged negligence, as his attorneys, in not having procured the attendance of a couple of witnesses, stated to be material, at a trial between plaintiff and another, in which plaintiff failed, but it not having appeared that the evidence of such witnesses would have produced a different result, the Court, on that ground, granted a new trial, and also because it appeared that defendants' leading counsel at the trial in question had decided upon proceeding without such evidence.

THIS was an action against the defendants for alleged negligence, as the plaintiff's attorneys, in the conduct of a suit, as charged in the second count of the declaration, brought by plaintiff against one Hoyt, in this, that they proceeded with the trial of the said action in the absence of one Edward O'Neil and certain other persons, who were, and whom they knew to be, necessary and material witnesses on the part of the plaintiff, and whom they neglected to subpoena, a reasonable length of time before the trial of said action, as witnesses on the part of the plaintiff, and whose attendance at such trial, as such witnesses, they neglected to procure, although they could have had said Edward O'Neil and said other witnesses subpoenaed in time to have procured their attendance at said trial, whereby said Hoyt recovered in said action, &c., &c.

At the trial it appeared that O'Neil was in the State of Michigan at the time of the trial of the action of *Wade v. Hoyt*, and that defendants, in pursuance of an arrangement made with him, sent him a subpoena, through his son, a week before the assizes, but it did not arrive in time to enable O'Neill to attend. It further appeared that counsel was retained by defendants for Wade in the conduct of the trial in *Wade v. Hoyt*; that defendant Ball was called as a witness, and gave evidence upon behalf of plaintiff, and that defendant Hoyt was himself called and was examined.

The learned judge at the trial allowed an amendment to be made in the count, charging negligence in not securing the attendance of the defendant Matheson as a witness,

and he charged the jury that the defendant's having suffered the case to go to the jury in the absence of the witness O'Neill and of the defendant Matheson, instead of taking a nonsuit, was evidence of negligence which would make defendant liable in this action. He dwelt also upon the fact that the defendants had not offered evidence to shew that they had laid before their counsel the fact that O'Neill and Matheson could give evidence contradictory of the evidence of the witnesses called for the defence, and confirmatory of the evidence given by Ball and by Hoyt himself.

The jury rendered a verdict for plaintiff for \$926.

In Michaelmas Term last, *J. H. Cameron*, Q.C., obtained a rule to set aside this verdict, filing affidavits of defendants' counsel stating that this amendment took them by surprise, also that in fact the trial of *Wade v. Hoyt* was conducted under the direction and advice of counsel, who, with full knowledge of all the facts, decided that the evidence of Hoyt and Ball was abundantly sufficient to justify the case being left to the jury.

N. Miller shewed cause, and *Cameron* supported the rule, citing *Swinfen v. Chelmsford*, 5 H. & N. 921, 922; *Strauss v. Francis*, L. R. 1 Q. B. 379.

[The CHIEF JUSTICE referred to *Hatch v. Lewis*, 7 H. & N. 367].

GWYNNE, J.—There must, I think, be a new trial granted in this case upon the *second count*: the only question is upon what terms.

It seems to have been overlooked that the right of the plaintiff to recover in this action involves the enquiry whether the evidence which it is complained by the plaintiff was not produced, would, if produced, have secured the plaintiff a judgment in the action against Hoyt, and that seems to be a very material enquiry, bearing in mind the fact that the main objection to the recovery in *Wade v. Hoyt* was a legal one, namely, whether the facts of the case were such as to constitute an account stated.

The rule will be for a new trial on the second count, costs to abide the event.

HAGARTY, C. J.—It must be borne in mind that, before these defendants can be made liable for the amount sought to be recovered in *Wade v. Hoyt*, it must be found, with reasonable clearness, that but for the alleged neglect of the attorney, such amount would have been recovered. Practically, such a suit as the present may involve the trying over again of *Wade v. Hoyt*. This cannot be avoided. If there were any reason why the plaintiff did not or could not have recovered in the former suit, if the missing evidence had been forthcoming, the same defence must apply here as a reason for not fastening on the attorneys damages which perhaps in no case were recoverable in the former suit.

GALT, J., concurred.

*Rule absolute for new trial, costs
to abide event.*

CHAMBERLAIN V. GREEN ET AL.

Chattel mortgage — Proviso for absolute ownership on default — Lease by mortgagee to mortgagor — Execution against mortgagor.

One S., on 25th March, 1868, executed a chattel mortgage to plaintiff, payable the following October, and containing a proviso that on default plaintiff, instead of selling the goods, might take possession as absolute owner. On default being made plaintiff accordingly went through a form of taking possession, without, however, any change in the possession actually taking place, and executed a lease of the goods to the mortgagor. After default, and before this taking of possession by plaintiff, an execution against the goods was placed in the Sheriff's hands, but no seizure was made until November, 1869, after the expiration of the mortgage, which had not been renewed:

Held, that the transaction between the parties was void, and that the execution took the goods.

Appeal from the County Court of the County of Peterborough, in an interpleader issue.

The facts were as follow:—On the 25th March, 1868, one Sherwood, at that time the owner of the goods in question, made a chattel mortgage to the plaintiff, which was duly executed and registered on 26th March, for securing payment to the plaintiff of \$400 on 1st October following. The mortgage contained no express provision respecting the retention of the goods by the mortgagor until default, but it contained the usual clause empowering the mortgagor to enter and take possession of the goods in case the same or any part thereof were removed from the County of Peterborough without the consent of the mortgagee; and also, in case of default, to seize and sell the same. There was also a covenant to pay the mortgage money and interest, and that, in case the goods were sold and did not produce sufficient to pay the mortgage money and interest, the mortgagor would make good any deficiency. There was then this proviso: “Provided always that it shall not be incumbent on the said party of the second part to sell and dispose of the said goods and chattels, but that in case of default in payment of the said sum of money, with interest thereon, as aforesaid, it shall and may be lawful for the said party of the second part peaceably and quietly to have, hold, use, occupy, possess and enjoy the said goods and chattels without the let, molestation, eviction, hindrance or interruption of him the said party of the first part, his executors, &c., or any other person or persons whomsoever.”

Default having been made in payment of the mortgage money, on 30th December, 1868, and before any possession of the mortgaged property had been taken by the mortgagee, a writ of execution against the goods of the mortgagor, at the suit of the defendants, was placed in the Sheriff's hands, but no seizure was made under it until 25th November, 1869.

One Cumming proved that about 5th January, 1869, he went to Sherwood's residence, accompanied by the plaintiff, and stated that he came to seize property; that Sherwood, the mortgagor, was there and that he told him his object

was to come and get settled, and that he wanted the goods if he could not get money; that Sherwood said he would give the goods, and that witness took possession of them by putting his hand on a table in the house, and going outside and seeing other goods he delivered all the goods to the plaintiff by telling him to take them, that he (Sherwood) gave them up. Although not stated positively, the inference from the witness' evidence was that the lease hereinafter mentioned was executed on the same day.

Another witness (Campbell) stated that he was at plaintiff's in January, 1869; Sherwood was there; also sleigh, harness, mare and bay horse; had seen them at Sherwood's, who had them previously; appeared to be the same; Sherwood got them away after lease was executed; knew Sherwood had them, apparently the same, for some time after; plaintiff said to witness that he was going to take property and lease it to him.

An agreement, dated 5th January, 1869, was proved, made between plaintiff and the mortgagor, whereby, after reciting the above mentioned mortgage, and that plaintiff had, by virtue of said mortgage, default having been made by the mortgagee, entered upon, seized and taken possession, &c., and then held the same absolutely as his own property, it was witnessed that said Chamberlain, in consideration of the payments and conditions thereinafter mentioned to be made and performed, &c., "hereby lets and leases and gives unto the said William Sherwood the free use and possession of the said goods and chattels following, &c.," (as in the mortgage), "to have and to hold the same for and during the term of one year, &c."

For the defence the Sheriff was called and produced a writ of *fi. fa.*, at the suit of defendants, against the goods of the mortgagor, received by him on the 30th December, 1868, and proved a levy on the articles in dispute, and being those included in the mortgage and in the lease of 25th November, 1869.

A verdict was taken by consent for plaintiff, with leave to defendants to move to enter a nonsuit, &c.

The defendants accordingly obtained a rule to enter a nonsuit.

After argument this rule was made absolute, and the plaintiff thereupon appealed.

Robinson, Q.C., for the appeal, cited *Woods v. Rankin*, 18 C. P. 44; *Courtis v. Webb*, 25 U. C. 577; *McMartin v. McDougall*, 10 U. C. 399; *May v. Routledge*, 14 C. P. 534; *Closter v. Headley*, 12 U. C. 364.

Spencer, contra, referred to *Doyle v. Lasher*, 16 C. P. 263, 270.

GALT, J.—From the evidence it appears that, on 25th March, 1868, a mortgage was executed by the execution debtor to the plaintiff, covering the goods now in question, which mortgage contained a proviso that if default was made the plaintiff might take the goods instead of selling them; that default was made, and that the plaintiff did take possession of the goods; and that, on the same day on which he took possession, he, professing to be owner, made a lease for one year of the goods to the mortgagor; that the mortgage was not renewed, nor was there any visible change in the possession of the goods by the mortgagor.

Before the passing of the Chattel Mortgage Act there were endless disputes arising from transactions where the possession of goods remained with the mortgagor or vendor, and though, after numerous conflicting decisions, it was decided that the question of fraud arising in such cases was not an absolute inference of law, but one of fact for a jury, the legislature deemed it necessary to interfere, and at present all mortgages and sales of goods and chattels in Upper Canada, not accompanied by an immediate delivery and an actual and continued change of possession, shall be absolutely null and void, as against the creditors of the mortgagor or vendor, unless they are in writing, and registered in accordance with the provisions of ch. 45, Consol. Stat. U. C., and in case of mortgages, unless they

are periodically renewed and registered. In the present case, the transaction was in its inception one of a mortgage character, and the mortgage was duly registered. It was, therefore, in the power of any person to ascertain whether or not the person in possession of the goods in question was the owner of them, or whether he was a mortgagor in possession. It is true that, upon examining the mortgage in question, he would have found that the mortgagee, in this case, had the option, if he pleased, of taking possession of the goods in case default should be made in payment of the mortgage money; but there was no obligation on the part of the mortgagee to adopt that course, but, on the contrary, there is an express covenant on the part of the mortgagor to make good any deficiency which might arise in case the goods, if sold, did not produce enough to satisfy the mortgage debt. It is contended that the mortgagee in the present case did exercise this right, and that, having done so, he made a lease of the goods in question to the mortgagor, and Mr. Robinson likened this case to one where a person purchased goods seized on execution, where it has been held that they are protected from subsequent executions, though the goods were suffered to continue in the possession of the defendant; but the reason for that is wanting in the present case, because the ground on which it was so held was, that the transaction was necessarily notorious to the whole neighbourhood, and the execution notice to the world.

The law bearing on the subject of secret conveyances of goods, previous to the passing of our act, will be found in *Kent's Commentaries*, pages 664 to 670, 7th edition.

Mr. Robinson candidly admitted that if it was necessary for the mortgagor to do any act confirming the title of the mortgagee, the present appeal could not be supported, because the provisions of the 4th section of ch. 45 had not been complied with, and the mortgage had not been renewed and refiled. The question, therefore, on which the present appeal turns, is, whether the taking possession in this case, as detailed in the evidence, and the subse-

quently making the lease, are of such a character as to relieve the mortgagee from the necessity of renewing and refiling his original mortgage. The object of the legislature in passing the Act, ch. 45, above referred to, was, in our opinion, to make that a presumption of law which before was a question of fact for the jury, and to declare that in all cases there must be a written and registered conveyance, where, by agreement between the parties, the right of property is transferred from the original owner without at the same time an immediate delivery and an actual and continued change of possession taking place. Upon referring to the proviso in the mortgage, it will be seen that it is not declared that a taking of possession of the goods in place of selling them shall vest them absolutely in the mortgagee, but, on the contrary, only confers on the mortgagee the right of taking possession in case of default, and, in our opinion, on the authority cited from Mr. *Beaumont's* Treatise, apart from the principle of the case, it would be necessary that some act of a public character should be done by the mortgagee before he could vest the property in himself, discharged from all equity of redemption on the part of the mortgagor, such as by an actual taking or change of possession, or by a public sale, in case the taking possession was under the provisions of the mortgage deed, and without, or contrary to, the wishes of the mortgagor.

If, on the contrary, the mortgagor was willing to convert what was originally a mortgage into an absolute conveyance, and to accept a lease from the mortgagee, then, in our opinion, it is necessary, by the 4th section of ch. 45, that such a transaction should have been in writing, and registered, under the provisions of that Act; otherwise the mischief intended to be guarded against by the Legislature would have taken place. In the absence of such an instrument, and in default of the refiling of the mortgage, in the case before us, we are of opinion that the claim of the execution creditor should prevail, and that this appeal should be dismissed with costs.

HAGARTY, C. J.—If the mortgagee had entered on his power and taken the formal possession proved here, and then had told the mortgagor that he might continue to hold the goods for one or two years at say \$40 a year, or under any terms to a like effect, I think, as a matter of law, a Court must pronounce it void against creditors. The formal arrangement by lease cannot, I think, place the parties in any safer position. No matter in what aspect the transaction before us may be regarded, it still retains the one substance. After the lapse of the year, and no refileing of the mortgage, it is simply the case of a debtor in the visible possession of goods actually belonging to another party, which to that other party had been originally mortgaged, and which had never left the possession of the mortgagor. The fact that after the making of the mortgage the parties choose to do some act or execute some deed, by which the relation of mortgagor and mortgagee ceases to exist, leaves the actual possession and apparent ownership just as they were.

I cannot understand, in short, when the parties have started as mortgagor and mortgagee, how the latter can acquire the absolute property, so as to defeat creditors, by any arrangement not involving an actual change of possession.

A sale by process of law, or other recognized public act, would present the case in a very different aspect.

GWYNNE, J.—The principle, as it appears to me, involved in this case is this, Where a chattel mortgage, executed under 22 Vic. ch. 45, in security for a debt, contains a proviso to the effect that, in default of payment of the debt on the day named in the mortgage, it shall not be incumbent upon the mortgagee to sell the mortgaged property, but that it shall be lawful for him to take possession of it, and to use and enjoy it without the let, hinderance, molestation, interruption or eviction of the mortgagor, his executors or administrators, or of any other person whomsoever, such a proviso will not, upon the mere occurring of

the default, convert the estate and title of the mortgagee in the mortgaged property into that of absolute owner. In such a case, when default is committed, the consent of the mortgagor, given without fraud, that the mortgagee shall have and hold the absolute interest in the chattels, discharged of the mortgage, in satisfaction of the mortgage debt, is necessary to perfect the title absolutely in the mortgagee, and if such consent be not accompanied with an immediate delivery of the chattels and a continuous change of possession, as in any other sale of chattels, the transaction will be void, unless evidenced by a bill of sale executed and registered under the provisions of the Act.

Here the mortgage was executed on the 25th March, 1868; the mortgage debt was made payable on the 1st October, 1868. Nothing was done then, nor until the 5th January, 1869, when the mortgagee went through a form of taking possession, without, however, any change of possession, and, in fact, executed a lease to the mortgagor, as if the property was then the absolute property of the mortgagee, referring to the property as being, when the lease was executed, in the mortgagor's possession, and containing a proviso that, in default of payment of a named rent, the lessor (mortgagee) might enter and take the chattels.

On the 30th December, 1868, a writ of *fieri facias* against the goods of the mortgagor had been placed in the sheriff's hands. At that time the equity of redemption in the mortgaged chattels belonged to the mortgagor; it was liable to seizure as his property under the execution; it still continued so to be, unless it was transferred to the mortgagee by a *bonâ fide* sale thereof made to him by the mortgagor before seizure; no such transfer or sale, evidenced by actual delivery of the chattels, accompanied by a continuous change of possession, or evidenced by a bill of sale executed and registered under the Act, ever was effected; the equity of redemption therefore still remained liable to the execution until the 25th March, 1869, when the equity of redemption, not being legally

conveyed to the mortgagee, and the mortgage not having been re-registered, as required by the Act, *the chattels themselves* became and were thenceforth liable to the execution and were legally seized under it in November, 1869.

If the conduct of the parties was, as perhaps it may have been, *bonâ fide*, it is unfortunate that they should not have complied with the provisions of the statute relating to chattel mortgages and bills of sale, which Act would be wholly nugatory if this transaction could be upheld as conveying the goods absolutely to the mortgagee.

Appeal dismissed, with costs.

YORKVILLE AND VAUGHAN PLANK ROAD COMPANY
V. BALDWIN.

Road Co. —Right to levy toll.

The plaintiffs were incorporated as a Road Company for the purpose of planking or gravelling the road between the point of intersection of Yonge Street with Bloor Street, on the northern limits of the city of Toronto, and the township of Vaughan, by way of the College Avenue Gate and a point called "Palin's Corners." In 1853 the village of Yorkville was incorporated, and in September 1854 that corporation passed a by-law, with a view to bringing the travel through the village, authorizing the conveyance by them to plaintiffs of that part of the Davenport Road lying between Yonge Street and "Palin's Corners" for the purpose of being planked or gravelled, under certain conditions specified, one of which was that defendants should levy a higher rate of tax upon those going south from the Corners, than on those going east, *i.e.*, through the village. Articles of agreement were accordingly drawn up between the corporation and plaintiffs, reciting the by-law, and then proceeding to state that the corporation thereby granted to plaintiffs said piece of road, measuring 838 yards, which the plaintiffs thereupon macadamized:

Held, that they could not collect toll on such portion, as no resolution had been passed by defendants for the purpose of constructing the piece of road in question, nor registered under sec. 11 of 16 Vic., ch. 190, which section was held to apply, though no additional stock was taken.

Per Gwynne, J., that the conditions on which plaintiffs had obtained the road, as to preferential rates of stock, &c., were unauthorized by the Act (16 Vic., ch. 190), and for this reason also they did not take it at all.

But, *Held*, that the main gate of defendants' road having been altered in accordance with the decision of the Court of Q. B. (27 U. C. 494), plaintiffs were entitled to collect toll on that portion of their road running south, as shown by the plan below, from Palin's Corners to Bloor street.

SPECIAL CASE.

The action was brought to recover from defendant the sum of \$7 for tolls alleged to be due by him to plaintiffs for the use of their road.

The following facts were agreed upon between the parties:

The Yorkville and Vaughan Plank Road Company were duly incorporated 16th June, 1849, under 12 Vic. ch. 84, the charter of the Company reciting the object of its formation to be for the purpose of constructing a plank road from the south-east corner of Potters' Field, on Yonge Street, in the city of Toronto, to the division line between the townships of York and Vaughan, &c., &c.

Then followed a certificate by the magistrate of the county of York of the registration of the charter on 15th October, 1869.

The Statutes affecting the case were stated to be 12 Vic. ch. 84, amended by 13 & 14 Vic. ch. 72; 16 Vic. ch. 190; 18 Vic. ch. 139; 22 Vic. ch. 43; all which Statutes were consolidated by C. S. U. C. ch. 49, further amended by 23 Vic. ch. 54 and 24 Vic. ch. 18.

At the time of the incorporation of said Road Co., the village of Yorkville was not incorporated, and was not until 23rd April, 1852, by proclamation, under sec. 58 of the Upper Canada Municipal Corporation Act of 1849, the incorporation to take effect from and after 1st January, 1853.

On 21st September, 1854, the corporation of Yorkville passed a by-law to allow the Yorkville and Vaughan Plank Road Company to extend their road easterly from a point called "Palin's Corners" to Yonge Street, on certain conditions, as follows: 1st, To keep and maintain in good order the portion of road above granted to them. 2nd, All parties residing within limits of said village to be permitted to travel free of toll when not going beyond limits of said village, and, when travelling beyond limits of village, no higher rate of toll to be levied than the rate charged on the whole line of road. 3rd, Company not to remove their gate nearer to Yonge Street than the easterly

boundary of the Avenue at Palin's Corners. 4th, Company to remove toll house 2 ft. 6 in. from the fence, so as to leave the foot road for passengers. 5th, In case of removal of toll house from present site, Company to place it at S.E. corner of said intersection. 6th, In order to send all travel through village, Company to levy a higher rate of toll on all parties travelling south from said corners than on those travelling east. 7th, All residents of village to have right to take cattle free of toll to pasture.

On 22nd September, 1854, articles of agreement were entered into between said municipality and said Company, witnessing that parties of 1st part, in consideration of the covenants to be performed by parties of 2nd part, granted, &c., that portion of the Davenport Road above mentioned, lying between Palin's Corners and Yonge Street; parties of second part covenanting to perform the above conditions.

Plaintiffs accordingly took possession of this new piece of road, and maintained it in repair. They also removed the toll house as required by 4th condition of agreement and by-law.

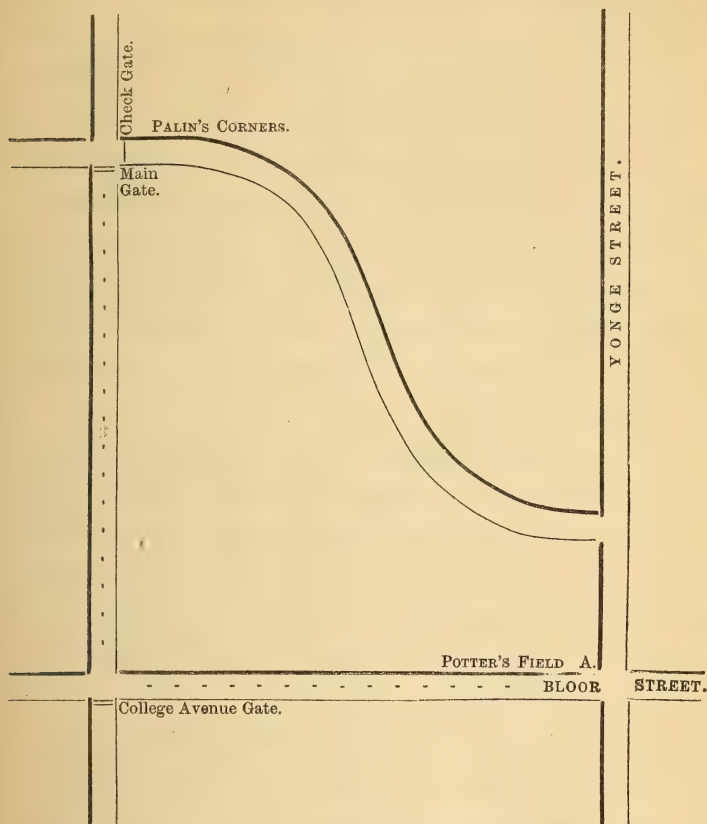
About the beginning of the year 1855, the Company's road, running south from Palin's Corners, falling into disrepair, they removed portions of the planks from that piece of road, which they intended to macadamize, and used them in repairing other portions of the road, and having thus unplanked this piece of road, they ceased to demand toll from parties making use of it until the autumn of 1862, when they macadamized it between Palin's Corners and Bloor Street, and re-imposed a toll, the payment of which this defendant resisted, and the plaintiffs took no steps to enforce payment of tolls thereon until the commencement of this action.

The following sketch will illustrate the portions of road in dispute, with the check-gate afterwards mentioned :

Dotted portions.—Chartered Line of Road.

The portion leading from Palin's Corners to Yonge Street.—Granted by By-law 21 September, 1854.

"A."—Point where Company's Road starts by Charter.



On 1st February, 1858, the municipality of Yorkville addressed a letter to the Road Company, enquiring as to the road between Palin's Corners and the city of Toronto limits on the College Avenue, whether the Company intended to repair it, &c., or hand it over to the municipality as one of the streets of the village, &c., &c.

On receipt of this letter the Company made certain repairs, but these being merely of a temporary character

they did not re-impose a toll until the road was substantially repaired, in 1862.

It was not the intention of the Company, when the by-law of 21st September, 1854, was passed, and the agreement of 22nd September, 1854, was entered into, to abandon, nor of the municipality of Yorkville to assume, that portion of the road running south from Palin's Corners, and on 16th January, 1864, the village of Yorkville passed an explanatory by-law to this effect.

After the decision on a special case, stated between the same parties, reported in 27 U. C. R. 494, the Company changed the position of their gates at Palin's, Corners, the gate being placed across that portion of the road running south from the Corners, and immediately to the south of the southerly limit produced of their road running east and west, and another gate, as a check-gate, being placed across their road running east and west, and within the limits of their chartered road.

The total length of the said road was stated to be 11 miles, the only other toll gate thereon being at a distance of $6\frac{1}{2}$ miles, going to the west and north from the gate at Palin's Corners, and at this other gate the rates of toll charged being the same as the rate imposed at Palin's Corners. The distance along said road south from the gate at Palin's Corners was stated to be 737 yards, and the distance east therefrom 838 yards.

The defendant, residing about a mile north of Palin's Corners, passed said first mentioned gate and the check-gate, coming into town and returning by those roads running south and east from Palin's Corners, and refused to pay toll, contending that plaintiffs, owing to the position of said gates, were not by law entitled to take any toll there from him travelling in either direction, and that under the circumstances stated they had abandoned that portion of the road running south from said gate.

The question for the opinion of the Court was, whether the Company were entitled to demand toll at the said gates. If the Court should be of opinion that the defendant, coming

from the north and going into Toronto past Palin's Corners to the east, was liable to toll, but was not liable going south, the judgment was to be for the plaintiffs for two dollars. Should they be of opinion that in going into Toronto past Palin's Corners to the south he was liable to toll, but not if going to the east, the judgment was to be for the plaintiffs for five dollars. Should they be of opinion that the defendant was liable to toll both in going east and south into Toronto as aforesaid, then judgment was to be for the plaintiffs for seven dollars.

In any of the above cases full costs of suit to plaintiffs.

But if the Court should be of opinion that the defendant was not liable to pay any toll at either gate, under the circumstances before stated, then judgment of *nolle prosequi* was to be entered up for the defendant, with costs of defence.

Christopher Robinson, Q. C., for the plaintiffs, cited *Wilson v. Groves*, 17 U. C. 419; *Little v. Dundas, &c. Road Co.*, 2 C. P. 399; *Angell and Ames on Corporations*, 109, 745; *Angell on Highways*, 354; *Reg. v. Brown & Street*, 13 C. P. 356.

Defoe, contra

The statutes cited are referred to in the following judgments :—

HAGARTY, C. J.—As I understand the case, the plaintiffs' original road ran along Bloor Street from Yonge Street, then north to Palin's Corners. The by-law of the Yorkville Council of 1854 allowed the Company to "alter and extend their line of road from Palin's Corners eastward to Yonge Street." It provided that the Company should not remove their gate nearer to Yonge Street than the easterly boundary of the Avenue at Palin's Corners.

By a deed, made the next day, the municipality conveyed to the Company that portion of the road from the Corners to Yonge Street, during their existence as a joint stock Company. The Company covenanted to keep the granted

road in repair. The road south of the Corners to Bloor Street falling out of repair, they ceased to levy tolls on it till 1862, but, defendant resisting payment, they ceased to levy tolls till this action. In January, 1864, the municipality passed another by-law declaring that it never was intended by the first by-law that they should assume, or the Company relinquish, that portion of the road running south from the Corners to Bloor Street.

By the judgment of the Queen's Bench, 27 U. C. R. 494, it was decided that a gate or side bar, which plaintiffs then had barring passage to the defendant and others coming from the north to their road, was illegal. Since then that gate or bar has been removed, and the main gate is (as shewn on within plan) across that portion of the road from the Corners to Bloor Street, from east to west, and at the south side of their road at the Corners, and a check-gate or side-bar (as shewn on plan) where the easterly extension starts from the Corners. There is nothing to bar the travel from the north coming on to their road, but no part of the eastern extension can be reached without passing the side bar. As to the main gate across their road, from east to west, I am of opinion that the defendant coming on to their road from the north cannot pass over that portion running south from the Corners to Bloor Street without paying toll. He thereby uses over one hundred yards of their road.

I see no reason whatever for holding that portion of the road to have ceased to be plaintiffs' property.

According to the Queen's Bench decision they could not make him pay toll simply to enter from the open highway to their road; but being on their road, I do not see how he can use seven hundred yards of it without paying toll.

The right to demand toll at the side-bar from persons going east to Yonge Street from the Corners, depends, in my judgment, on the question whether the eastern extension (about eight hundred yards long) is to be considered as the plaintiffs' road, on which by law they can levy tolls.

If it be a public road on which they cannot levy toll, the defendant's case seems clear, as he cannot be liable to toll merely for crossing their road, using less than one hundred yards of it, or rather for merely turning at a right angle from one open road to another open road at a point where a toll road joins them. See sec. 31, 16 Vic., ch. 190.

The plaintiffs are registered under the general Act, and the instrument of incorporation deposited in the Registry Office under the Statute. Their purpose of incorporation is there stated to be, "for the purpose of constructing a plank road from the south-east corner of Potters' Field, on Yonge Street, to the division line between the townships of York and Vaughan." The Company seems to have done nothing further under the Statute in the way of any other registration claiming any other line of road, or any addition to that mentioned in the schedule filed in 1849. They adopted the line mentioned, from the south-east corner of Potters' Field along Bloor Street, then north to the Corners, then west, &c., &c. For several years that was their only line. In 1854 they take this grant from the Yorkville Council. It is a totally different line, and certainly not answering the description in their schedule filed. It runs from the Corners to a totally different point on Yonge Street. When the by-law of 1854 was passed the Statute in force was 16 Vic. ch. 190. Sec. 11 declares that if after the formation of the Company, the directors desire to widen, extend or alter the projected line, to construct any side roads to intersect the original main road, &c., or that the original capital be not sufficient to complete the work contemplated by the Company to be executed, or to be extended or altered, it shall be lawful for the directors, under a resolution to be passed by them for that purpose, either to issue debentures, &c., or to borrow on their security or bond, or mortgage of the road and tolls, a sufficient sum of money to complete the same, or to authorize the subscription of such number of additional shares as shall be named in their resolution, a copy whereof, under their seal, shall be engrossed at the head

of the subscription list; and when a sufficient number of new shares be subscribed, the new list shall be attached to the original instrument with the Registrar, to be held and taken as part and parcel of the original instrument; and all the subscribers thereto, and those who may afterwards enter their names as subscribers, shall be entitled, &c., as well to the first line of road as to any widening, extension or alteration thereof, as aforesaid, and which the said Company are hereby authorized to widen, make and construct, and which shall thenceforth be considered as part and parcel of the original line.

By sec. 25 of same Act they may sell to the municipality of the locality.

By sec. 5, the Company shall be capable of purchasing, taking, having, holding and conveying, selling and departing with any land, tenements and hereditaments which may be useful and necessary for the purposes of such corporation.

Sec. 55 cures irregularities in the formation or registration of Companies under certain conditions, but is not prospective.

The form of schedule for registration, appended to the Act, requires a statement of the commencement of the intended road and terminations thereof, "describing the line of intended road, or other such work."

The plaintiffs, on the argument, seemed to rely altogether on the Municipal Acts for their right to this portion of the road.

12 Vic. ch. 81, sec. 59, gives to villages the same power as to townships, and sec. 31, sub-sec. 17, allows townships to pass by-laws to regulate the manner of granting to Road Companies permission to proceed with any roads, &c., within their jurisdiction, and to regulate the declaration of their completion, &c., &c., so as to enable the Company to levy tolls thereon, &c., &c.

Sec. 191 of same Act allows a municipality to contract with persons to plank, &c., any road which they themselves have, under the Act, a right to plank, &c., and to grant to

them in consideration, or part consideration, the tolls to be levied on same when completed. But the tolls must be fixed by the municipality and not be in the discretion of the grantees; and the grant must be longer than ten years; and no road company shall have power of interference with any authority conferred by the by-law, or any persons under the authority of this section.

Sec. 31, sub-sec. 31, enables municipalities of townships (and villages as above), to raise money by way of tolls on any road, &c., to defray the expenses of making, repairing, &c.

No other part of the municipal law was quoted in support of plaintiffs' argument.

I see nothing in the municipal Acts apparently justifying the grant of a public road to a Road Company, with a right to the Company to levy tolls thereon.

This right (if they possess it) must rest on their own rights, under the Joint Stock Road Acts, to deal with this new piece of road in the same manner as if it formed part of their original undertaking.

If it be in their power to extend their original road by the addition of this piece of road, the grant from the municipality, although beyond their general powers, would, at least, amount to a license to the Road Company to take this piece, a step which could not be taken without their assent.

Then, have the Company power to do this with such assent, and is any further registration or other act required to be done by them under their general Act?

It seems evident that the clause I have already quoted (sec. 11, 16 Vic. ch. 190), was drawn under the impression that if the Company made any extension, &c., they would require money so to do. If the directors be of opinion it is desirable to widen, extend, or alter the projected, or to construct side roads to intersect the original main road, or if they think the original capital not sufficient to complete the contemplated work, or the extension, then, under a resolution to be passed, they may issue debentures, or borrow money, or may authorize subscrip-

tion of new stock. A copy of this resolution shall be engrossed at head of the subscription list, and the president shall deliver the new list to the registrar, who has the original instrument, and he shall attach the new list thereto, and the new subscribers shall have same rights as the original subscribers, as well to the first line of road as to any widening, extension, or alteration thereof as aforesaid, and which the said Company are hereby authorized to widen, make, and construct, and which shall thenceforth be considered part of the original line. The last clause is omitted in the Consolidated Act.

I cannot find that this question has been before our Courts.

In 1851, there is a case of *Attorney General v. Nepean Road Company* (2 Grant, 638), where Chancellor Blake says, "The instrument to be registered is only required to specify the *termini*; but the *termini* being settled, the road may be varied in any direction."

There was nothing in the case connected with re-registration.

In *Totten v. Halligan* (13 C. P. 567) it was held that under the statute the road might be sold on execution against lands, and the purchasers would hold all the right and franchises and be subject to all the legal duties and obligations of the corporation.

The statute 29 Vic. ch. 36, passed in 1865, amends the preceding acts, and expressly provides for the widening, extending, or altering of the projected line, or the construction of side roads to intersect, &c., and that resolutions therefor are to be passed, which are to be registered with the original instrument; and provision is also made for increase of the capital stock when required. See section 4.

The absence of these precise directions from the Act of 1853 causes all the difficulty in the case before us.

The clause construed literally seems to provide for registration only where there is a fresh subscription; yet I cannot but think that the legislature intended some notice to the public of the design to construct a new side

road or to adopt as part of the line some public road intersecting the actual line. The subscription of new shares is only one of the cases pointed out. The issue of debentures, or the borrowing of money on the tolls, &c., are both mentioned.

I think we should hold that there must be a resolution of the directors declaratory of the new design, setting out, at least, as distinctly as the statute prescribed for the original schedule, the proposed alteration, or the new side or other road to be added to or form part of the existing undertaking.

The copy of the resolution is to be engrossed at the head of the subscription list. It is there said, "When such a number of new shares shall have been subscribed as the directors shall deem it desirable to have registered." This would seem to point to registration as a thing to be done in any event. Then, the president shall deliver the new list to the registrar, the resolution being engrossed at its head, and the registrar shall attach it to the original instrument, and it becomes part and parcel thereof.

Now, the directors may stop short and register when one or two small subscriptions are obtained, for, say, only a tenth of the whole amount required.

The clause proceeds, "*And all the subscribers thereto, and those who may thereafter enter their names as subscribers thereon*, with the consent of such directors, to be signified by a resolution of the board under the hand of the president and seal of the Company, shall be subject to all liabilities and entitled to all the rights, &c., to which the original subscribers shall thenceforth be entitled, and as well to the first line of road as to any widening, extension, or alteration, &c., and which the Company are hereby authorized to widen, make and construct, and which shall thenceforth be considered as part and parcel of the original line."

I think it clear that as soon as the resolution, with as many or as few subscribers as the directors please, is registered, the Company may proceed to exercise their new powers and execute their new works.

It does not say, when the full subscription required for doing the new work is obtained it shall be registered, but when such a number is subscribed as the directors deem it desirable to register. This leads me to consider *that registration of the new project* was what the legislature designed rather than a mere statement of the names and amounts subscribed.

It was obviously of far greater importance to have the altered design, and a reasonably clear definition of the new line of road proposed to be made or taken, registered for public guidance and information, than a mere statement of the number of subscriptions.

Large powers as to taking land and levying tolls on highways, heretofore free to the public, are given to the Company. It would seem almost indispensable that they should be at least required clearly to define their position. If not, the result is that on an original registration for a road, say of five miles long, between named *termini*, the Company, by leave of the municipalities, might cover the whole county with connected roads.

In this view, I am inclined to think, after much hesitation, that we should require proof both of a resolution defining the new design and its registration with the original schedule, before we can consider the Company entitled to levy toll on the new easterly extension.

If it be urged that it is only where there is a new subscription list that there can be a registration, it may be answered that, assuming registration to be the only means by which a new and distinct road with a different terminus can be made part of the original design, then the directors must effect the necessary registration in the only way allowed; at the most, the creation of any small number of new shares would effect the object.

I admit my great doubt on this section of the Act, in consequence of the defective wording; but if I err, I prefer erring on the side of requiring registration as a necessary step before such an important change can be made in the purpose and nature of the corporation.

We have no averment in the special case of any resolution having been passed, nor of any thing done by the Company except executing the agreement with the Yorkville council.

As far as the public are concerned, there seems to have been nothing whatever done by the Company to notify their assumption of the new road.

In this view my judgment must be that the plaintiffs have no right to charge toll on the eastern extension from Palin's corners.

Treating the deed from the municipality as, at all events, a good license to the plaintiff to take that piece of road, the latter for the reasons pointed out have not made it legally part of their property.

I do not feel as strongly as my brother Gwynne the difficulties suggested by him as to the peculiar bargain between the Yorkville Council and the Company, as to preferential rates of toll, &c.

I think there should be judgment for the plaintiff for \$5.

GWYNNE, J.—Plaintiffs, on 16th June, 1849, formed themselves into a Company under the provisions of 12 Vic. ch. 84, for the purpose (as declared by an instrument of that date, and which was registered in the County Registry Office on 5th October, 1849), "of constructing a plank road from the south-east corner of the Potters' Field, on Yonge Street, to the division line between the townships of York and Vaughan." Although no particular line of road between these *termini* is specified in the instrument, the Company, in fact, in performance of the purpose for which they were formed, constructed a plank road from the south-east corner of the Potters' Field, upon Yonge Street, westerly along a street, called Bloor Street, situate then partly in the city of Toronto and partly in the township of York, to a road, called the College Avenue; thence northerly along such last mentioned road until it intersects another road, called the Davenport road, running east and west, at a place called Palin's Corners; thence westerly,

along the Davenport road and other roads, to the division line between the townships of York and Vaughan. At the time of the passing of 12 Vic. ch. 84, Yorkville was not, but at the time of the passing of 16 Vic. ch. 190, it was, an incorporated village, under and subject to the provisions of the Municipal Incorporation Acts.

The 11th clause of 16 Vic. ch. 190 (which was passed on the 14th June, 1853) enacts that, if at any time after the formation of any such joint stock company the directors should be of opinion that it would be desirable to widen, extend, or alter *the projected* line of road, to construct any side road to intersect the original main road (or to do other things not material in this case), it shall and may be lawful for the said directors, *under a resolution* to be passed by them for that purpose, either to issue debentures for sums not less in amount than £25 each, signed by the president, and countersigned by the treasurer of the said Company, not exceeding in amount, in the whole, one-half of their *paid-up* capital stock, or to borrow, upon security of the said Company, by bond or mortgage of the road, and tolls to be collected thereon, a sufficient sum of money to complete the same, or to authorize the subscription of such number of additional shares as shall be named in their resolution, a copy of which resolution, under the hand of the president and seal of the Company, shall be engrossed at the head of the subscription list. It then provides that this new list of new shareholders shall be registered and attached to the original instrument filed upon the incorporation of the Company, and that thereupon the new shareholders shall become entitled to the like privileges to which the original subscribers are entitled, and as well to the first line of road as to any widening, extension, or alteration thereof.

I must confess that I can see no reason why a copy of the resolution, under the hand of the president and under the seal of the Company, should be attached to the original instrument only when the money for constructing the extension or a side road to intersect the original main line

is to be raised by new shares, and that it should not be necessary when it is to be raised by other means.

The Act 12 Vic. ch. 84, as well as the Act 16 Vic. ch. 190, only authorizes the formation of a Company, for the construction of a road, of the kind mentioned in the preamble of the Act, in and along or over any public road or highway, or allowance for road, *or along or over any land, provided* that no such road shall be constructed through, over, or along private property, or property of the Crown, unless the Company shall have first obtained the permission of the owners or of the Crown so to do, except, as provided in the Act, by arbitration in case of difference; and *provided, further*, that no such road shall be constructed or pass within the limits of any city or the liberties thereof, or within the limits of any incorporated town or village, *except by special permission* under a by-law of such city, town or village, *to be passed for that purpose; and provided* further, that an instrument should be registered, the form of which is given by the Acts, declaring the purpose for which the Company is formed, namely, "for the purpose of constructing a road from (*the commencement of the intended road*) to (*the termination thereof*)," to which words are added, in 16 Vic. ch. 190, these words following, "*describing the line of the intended road.*" Now, if it be necessary that, before the Company could move at all, there should be filed an instrument "*describing the line of the intended road from its commencement to its termination,*" why should it not be equally necessary that the resolution, which by the Act 16 Victoria is the primary and sole authority for the construction of *any extension* or of *any side road to intersect the original main line*, should be given the same publicity?

There appears to me to be an imperative necessity, when a Company undertakes to proceed under the 11th section of 16 Vic. ch. 190, that they should pass the resolution there prescribed, defining their purpose, namely, whether it is to construct an *extension* of the line first registered, or to adopt an alteration in a part, substituting a new

piece of road in lieu of a portion of the line already registered, and abandoning such latter portion, or whether it is to construct *a side road* to intersect the original registered line, and the publicity of this resolution, by registration, seems to me to be essentially necessary to enable private proprietors to resist, as trespasses, the entry by the Company and their servants upon their lands, unless they come under the authority prescribed by the Act, and having that authority to prevent them exceeding its limits, and to give to arbitrators some fixed data whereupon to award appropriate compensation; and with respect to municipalities, to enable them to pass a by-law, as contemplated by the 3rd sec. of 16 Vic. ch. 190, *prohibiting, varying or altering any such intended line of road.*

There seems to be reason for holding that the powers conferred by the 11th section of 16 Vic. ch. 190, in so far, at least, as *extending or altering* are concerned, are limited to a period *anterior to the construction of the road.* The words of the section are, "If at any time after the formation of any such Company the directors be of opinion that it is desirable to widen, extend or alter the *projected* line of road, *or* to construct side roads to intersect *the original* main road, *or* to improve or repair any road by substituting stone, gravel, plank, or other suitable material, *or* that the original capital subscribed will not be sufficient to complete the work contemplated by such Company to be executed, or to be extended or altered, *it shall and may be lawful* for the said directors, *under a resolution to be passed by them* for that purpose, either to issue debentures for sums not less in amount than £25 each, signed by the president and countersigned by the treasurer of the Company, not exceeding in amount, in the whole, one half of their *paid-up* capital stock, *or* to borrow, upon the security of the said Company, by bond or mortgage of the tolls to be collected thereon, a sufficient sum of money to complete the same, *or* to authorize the subscription of such number of additional shares as shall be named in the resolution, a copy whereof, under the hand and seal of the Company,

shall be engrossed at the head of the subscription list to be opened for subscribers." Now the term "*projected line of road*" seems to be inapplicable to a road *completed and constructed*. The powers conferred upon the Company, to widen, extend or alter the line, would seem, then, to be confined to a period *anterior* to the complete construction of the registered line. The 27th sec. of 16 Vic. ch. 190, seems to give confirmation to this view, whereby the companies are *bound* and required to complete every road, *or extension thereof*, within two years from the day of their becoming incorporated under that Act. This seems inconsistent with the notion that the power of extension may be exercised at any time after the completion of the road. So, likewise, the proviso in the 27th section, which section confers the power of levying tolls, to which there is this proviso: Provided always that, so soon as two or more miles of any such road, *or extension thereof*, shall have been completed, *tolls may be taken therefor*, but on no other work shall tolls be taken until the same be completed. Here the extension is spoken of as being partly constructed before the completion of the *original main road*.

It does not appear to me to be quite clear that the power *to construct side roads to intersect the original main road* is not also limited to a period anterior to the construction of the main line; and there seems nothing unreasonable in this, for the only difference would be that, if proposed to be done before the registered purpose of the Company, as appearing upon the instrument executed at its formation, was completed, it might be done *under a resolution*; whereas, if proposed to be done after the final completion of the road, as appearing upon the original instrument, it might be deemed to be but reasonable to leave the Company to construct any new lines, either intersecting or in extension of their completed road, under a new organization and a new instrument, filed in the manner provided by the Act upon the formation of a Company, thereby necessitating the new road to be of the minimum length

required by the Act before tolls could be imposed thereon. But, granting that it is competent for a Company, under this section, *to construct side roads to intersect the original main line at any time* after the completion of the original main line, and admitting, as I think must be admitted here, that the line east from Palin's Corners along the Davenport Road to Yonge Street sufficiently comes within the description of such a road, still it remains to be enquired whether the plaintiffs have, *under* and in accordance with the provisions of the Act, such right in and control over this road as to entitle them to impose tolls upon persons travelling upon it, as claimed in the case.

The plaintiffs rest their title to the privileges which they claim upon a by-law of the municipality of the village of Yorkville, passed on the 21st day of September, 1854, entitled a "By-law to enable the Yorkville and Vaughan Plank Road Company to extend their road easterly from Palin's Corners to Yonge Street." This by-law recites as follows: "Whereas it is to the benefit of the village of Yorkville, as well as the said Company, *to alter their line of road*, by extending it easterly from Palin's Corners to Yonge Street *instead of the line now used*," and it enacts that "*therefore* it shall and may be lawful for the Yorkville and Vaughan Plank Road Company to *alter and extend* their road from Palin's Corners, in the said village, easterly to Yonge Street, *upon certain conditions*, as follows :

1st. That the said Company shall at all times *keep and maintain* in good order, as required by the Act incorporating the Company, the portion of road *above granted to them*.

" 2nd. *That all persons residing within the limits of the said village shall be permitted to travel free of toll when not going beyond the limits of the said village, and that when going beyond the limits of the village no higher toll to be levied than the rate charged on the whole line of road.*

" 3rd. That the Company do not remove *their gate* nearer

to Yonge Street than the easterly boundary of the Avenue at Palin's Corners.

"6th. That in order to send *all the travel through the village, the Company levy a higher rate of toll on all parties travelling south from the said Corners than they charge to parties travelling east.*

"7th. *That all parties residing within the village shall have full liberty to take cattle and horses free of toll to pasture.*"

Upon the 22nd September, 1854, a deed was executed between the parties under the seals of the municipality and of the Company.

This deed recites the passing of the by-law, and that the conditions whereon it was passed were to be secured by the covenant of the Company, and that the parties to the deed had it in view to act in the matter for the mutual benefit of the said village of Yorkville and of the Company. The deed then witnesses that the municipality, "*in consideration of the covenants hereinafter contained, to be performed by the said Company,*" have granted, conveyed, and confirmed, "*and by these presents do grant, convey and confirm,*" to the said Company, their successors and assigns, "*for the period of their existence as a joint stock Company,*" that portion of the Davenport Road above mentioned lying between Palin's Corners and Yonge Street. The Company then covenanted to fulfil the conditions as above extracted from the by-law.

Upon the execution of this deed, the plaintiffs took possession of this piece of road in pursuance, as the case states, of the foregoing by-law and deed. About the beginning of the year 1855, they took the plank off the road running south from Palin's Corners and put it on other parts of their line, and, having unplanked this piece of road running south, they *ceased to levy any tolls thereon* until the autumn of 1862, when they macadamized it as far as Bloor Street, a distance of 737 yards; but it is not alleged that they have at any time since 1855 planked, macadamized, or gravelled, or otherwise repaired, that part of their

original line extending along Bloor Street from the College Avenue easterly to Yonge Street, the north half of which is within the limits of the village of Yorkville and the south half within the limits of the city of Toronto, a distance which by the map appears to be nearly as far as from Palin's Corners to Bloor Street. After macadamizing from Palin's Corners to Bloor Street, the plaintiffs reimposed a toll upon that piece, which the defendant having resisted, the plaintiffs have taken no steps to enforce payment of the tolls thereon until the commencement of this action. The defendant enters on the plaintiffs' road at Palin's Corners, coming from the north, and he is stopped there from proceeding to the city of Toronto by two gates which the plaintiffs have erected, at which they levy toll, one of which they call their main gate, situate across the road going south, immediately south of the Davenport Road, and the other, which the plaintiffs call a *check gate*, but which, in truth, is also a *main gate*, situate across that part of the Davenport Road which the plaintiffs claim under the by-law and deed above recited, and they do not permit the defendant to enter either upon the road going south or upon that going east from Palin's Corners without paying toll; and the question is, whether they are entitled to demand toll from him through whichever gate he passes, and upon whichever of those pieces of road he desires to travel, or at neither.

The piece of road going east from Palin's Corners, before and at the time of the passing of the by-law of the 21st September, 1854, was a public highway, situate within the village of Yorkville, but how established is not stated; but, however established, I can find nothing in the Municipal Corporation Act which empowers the municipality to grant, convey and confirm that piece of road to the Company, their successors and assigns, in the manner which they have professed to do by the deed executed in pursuance of the by-law. *That grant, therefore, is void.* Neither do I find anything authorizing or empowering the municipality, in virtue of

its municipal powers, to grant, convey or confirm to the plaintiffs, any right to impose or levy any tolls upon the piece of road in question, except such powers as are involved in the 191st section of 12 Vic. ch. 81. By that section it is enacted that it shall and may be lawful for any municipal corporation to authorize *by by-law* any person or persons, who may be willing to contract with them for that purpose, to plank, gravel or macadamize any road which, under the provisions of the Act, any such municipal corporation would themselves have a legal right to plank, gravel or macadamize, and to grant to such person or persons, in consideration or part consideration of the execution of such work, the tolls to be levied on the same after it shall be completed; *provided always*, firstly, that the rate of tolls to be taken upon such work shall in all cases be fixed by by-law of such municipal corporation, and *provided also*, secondly, that no such tolls shall be leviable until such municipal council shall, *by a subsequent by-law*, declare that the work contracted for has been completed, and *that the tolls* may be collected *thereon* accordingly; and *provided also*, thirdly, that the grant of such tolls shall in no case be for a longer period than ten years from the time of passing such last mentioned by-law. The municipality have not proceeded, nor is it pretended that they have proceeded, under the authority of this section.

The only question that remains then is whether the by-law of the 21st September, 1854, and the deed executed *in pursuance thereof* (for they cannot, I think, be separated, the deed being not only declared to be executed in pursuance of the by-law, but for the purpose of securing the fulfilment of the conditions upon which it was passed), can be held to be acts done within the meaning of the 16 Vic. ch. 190, sec. 2, granting permission to the Company to construct a plank, macadamized, or gravel road in, along, or over a public highway within the limits of the municipality, and whether the Company have so exercised the powers conferred by *their* act as to entitle them to assert the privileges granted by the act of levying tolls upon persons travelling along such public highway.

This, I say, appears to be the only question, for it is not pretended that the transaction was one within the 26th section of 16 Vic. ch. 190, namely, the sale of a macadamized, plank or other toll road which the municipality had constructed or purchased.

The by-law contemplated by the Act is simply a by-law granting or authorizing to the Company permission to exercise the powers conferred upon them by the Act either in, along, or over a public highway, or to pass through any private property selected by the Company for the purposes of their Act, without which permission the Company could not exercise any of their powers within the limits of the municipality. The Act does not contemplate that the municipality should impose any restrictions upon the Company inconsistent with the provisions of the Act authorizing them to construct their road, or securing to the municipality and its inhabitants, superior rights and privileges over those claimable and enjoyed by all persons travelling upon or using the road; or that the Company should, in consideration of the permission, impose upon the general public using the road heavier and unjust burthens, because they may not wish to reach the centre of the municipality by the particular route by which the municipality, for the real or fancied gain of its inhabitants residing upon a particular street, or in a particular section of the village, may wish to compel persons to enter the village, and to prevent the produce of the surrounding country to reach the City of Toronto without first passing through such a portion of the village as the village municipality shall prescribe as the route to the city. The clauses of the Act which relate to the nature of the by-law, which the Act contemplates, are a proviso to the second section, and the enactment of the third section of 16 Vic. ch. 190, which was the Act in force regulating the powers and privileges of the Company at the time of the passing of the by-law. The proviso to the second section is, "Provided also that no such road shall be constructed or pass within the limits of any city or the liberties

thereof, or within the limits of any incorporated town or village, except by special permission, under a by-law of such city, town, or village, to be passed *for that purpose* ;” and the third section is “That no Company, to be formed under the provisions of this Act, shall commence any work until thirty days after the directors shall have served a written notice upon the head of the municipality in the jurisdiction of which *such* road,” [that is, *such* road in the preamble of the Act, namely, a plank, macadamized, or gravel road, or composed of the material mentioned in the 22nd section, namely, composed “in whole or in part either of metal, gravel, timber, charcoal, or any other material for constructing a firm, substantial, and smooth surface) “is intended to pass or be constructed, and that if the municipal council of such locality shall pass any by-law prohibiting, varying or altering any such intended line of road, such by-law shall have the same force and effect, and be as binding, effectual and obligatory, upon all persons whomsoever, and upon such Company, if such Company proceed in the construction of such road, as if the provisions thereof had been inserted in the body of this Act ; provided always, that if no such by-law shall be passed within thirty days after the service shall have been made upon such head of the municipality, then the said intended road may be proceeded with without being liable to any interruption from any source whatever.” Now, from this it appears that the only course to be pursued by the municipality, or which the Act justified, was, upon receiving notice that the Company intended constructing a plank, macadamized, or gravel road along the Davenport Road from Palin’s corners to Yonge Street, under the powers contained in the Act, either to pass a by-law, *unconditionally* granting the permission, or to pass a by-law *prohibiting* or *varying* the intended line, but otherwise imposing no conditions ; or to let thirty days elapse after receiving the notice without passing any by-law, which default the Act declares shall be equivalent to the passing a by-law granting the *unconditional* permission, or to a dispensation therewith.

By the by-law, and by the deed expressed to be made in pursuance thereof, and for the purpose of securing fulfilment of its conditions, it is declared that the municipality only grant the rights which they profess to grant, *upon and subject to special conditions* which the Company under their common seal declare they accept as qualifying and restricting the grant, namely, that for all time to come *all* the inhabitants of Yorkville, however numerous they may become, shall have and enjoy the use of the piece of road free of toll, and shall pass free through this very gate at which the defendant is stopped, and not only so of this piece of road, but also in like manner of the piece of road running south from Palin's corners (where the defendant is also stopped and charged toll) and so round to Yonge Street again at the south-east corner of the Potters field; and further, that during all time to come *all* such inhabitants shall have the privilege of using the Company's road free of toll for the purpose of taking their horses and cattle to pasture; and further, that for the alleged special convenience of the inhabitants of Yorkville in all time to come, *all* persons coming from the west along the Company's road past Palin's corners shall be charged a higher rate, if, instead of continuing on eastward, they should diverge to the south, so as to prevent their having free access to the City of Toronto, unless they shall pass through that precise part of the village which the municipal authorities of that locality *prescribe* as the route by which all persons coming along the Company's road shall enter the village and the city. The statute, which alone confers upon the company the power to levy tolls, viz., 16 Vic. ch. 190, sec. 28, only makes it lawful for the directors to fix, regulate and receive the tolls to be received from *all* persons passing and repassing with horses, carts, carriages, and other vehicles; and in the 29th section, for *every* vehicle, for *every* horse and rider, for *each* head of cattle, for *every* loaded vehicle, &c., &c.

It appears to me that the words imply that the tolls shall be levied upon *all* persons in the like position, and

upon *all* horses, cattle, &c., &c, subject only to the qualification as to commutation contained in the 23rd section, and to the exemptions in the 39th. Moreover, by *the Act*, the power of fixing the tolls is conferred upon the directors, to be exercised by them *from time to time*; but *by the condition*, upon which this piece is accepted, the discretion and power of the directors is fettered and controlled for all time to come, not only on this piece, but also upon that part of their original line running south from Palin's corners, that being also within the limits of the village. Again, if this piece be a part of the road of the Company, and be held by them under the provisions of the Act, the directors may, at their discretion, by the 31st section, erect their toll gate at any point they please within or without the limits of the village, provided it should be at the distance from the next gate prescribed by the Act; but under the conditions, subject to which the Company claim to hold this road, the directors never can, at any time to come, exercise that discretion by placing their gate any further east than the east side of the Avenue at Palin's corners. In this respect, also, the discretion of the directors for all time is fettered in a manner inconsistent with the provisions of the Act. These conditions appear to me to be wholly unauthorized by the Act, and, in my opinion, a piece of road which is claimed to be held by the Company under and subject to conditions which are repugnant to, and unauthorized by, the Act, cannot be a piece of road held under the powers and provisions of the Act.

Moreover, in the absence of any resolution of the nature referred to in the 11th section, sanctioning the assumption of this piece of road by the Company, *under* which resolution only, if at all, is the power conferred of enabling the Company to acquire the road, this piece of road cannot be said to be held *in virtue of and under the powers* conferred by that section. The special case states no resolution having been ever passed authorizing the Company for any purpose to acquire this piece of road, or to construct a work, under their corporate powers, on, along, or over it;

yet, as it appears to me, such a resolution must be made the very foundation of the plaintiffs' title if they have any. That there was a resolution cannot be presumed, for still we should require to know its contents; namely, whether the intent and purpose of the Company was to abandon a part of their road already acquired, and to substitute another piece of road for it (as 'would seem to have been the intent, judging from the terms of the by-law which the Company have adopted and accepted as the foundation of their title, and from their own acts of immediately stripping the old piece of road of its material, and leaving it in that condition upwards of seven years), or whether it was desired to be acquired as a side road intersecting the main line, as now claimed. I take the non-statement of what I conceive to be the statutory foundation of the plaintiffs' claim, if they have any, as an admission of its non-existence, and if anything is to be presumed, it is, I think, that the ancient superior rights of the general public, which existed long before, and at the time of, the passing of this by-law, to travel upon and use this road at their pleasure as a public highway, free of toll, exists, and must still continue to exist, *until it is proved by sufficient evidence* that the only means provided by the Act for divesting the public of this right and subjecting them to the control of the plaintiffs have been pursued; and this the more especially when we find that the plaintiffs have suffered fifteen years to elapse since their alleged acquisition of the road before they asserted the peculiar right which they now do assert, of levying tolls from those who, not being inhabitants of the village, pass over this piece of road, either entering upon it or departing from it at Palin's Corners, a distance wholly within the limits of the village.

According to the best consideration which I have been able to give this case, the plaintiffs have not, in my opinion, acquired under the powers of their Act, that piece of road, called the Davenport Road, extending from Palin's Corners easterly to Yonge Street, so as to

make it part of their chartered road, or to entitle them to levy toll from the defendant or any person travelling upon it, whether living within or without the limits of Yorkville.

Then, as to the gate at Palin's Corners, across the Avenue. Whether it was or not the intention of the Company, in 1854, to abandon that portion of their road extending from Palin's Corners to Yonge Street, at the Potters' Field, of which, I think, a resolution of the board of directors is the best, or perhaps the only, admissible evidence, and to acquire that portion of the Davenport Road extending easterly to Yonge Street, *in lieu of and in substitution for* the piece proposed to be abandoned, and assuming that the Company had authority under the provisions of the Act to effect at that time such substitution, and notwithstanding that in the beginning of the year 1855 the Company stripped the piece of road extending southerly and easterly to the Potters' Field of its plank, and suffered it to relapse into its former condition, and to remain so for upwards of seven years; still, as I am of opinion that they never did acquire the Davenport Road piece, so as to bring it within their chartered power, and under their control, subject to the privileges conferred upon them by the act of levying tolls, I am of opinion that the Company have not, by reason of anything appearing in the special case, lost their chartered powers over the piece extending southerly to the city limits, and thence easterly thereon. But the case states that when the Company, in 1862, restored the road extending southerly, they did so only to the city limits: nothing is said as to the residue of the line. I do not read the case as raising a question whether, assuming them to have suffered that residue to remain in its former condition, to which it was reduced in 1855, without since restoring it, they have or not lost the power of levying toll on it. If that point was intended to be raised, it should have been raised precisely. I do not consider the case to have been argued as if that point was before us, and not considering it to be before us, I am of

opinion that the Company have still the power of levying toll on that piece until action shall be taken, if the occasion should require it, under Consolidated Statute, 22 Vic. ch. 49, sec. 85, and 23 Vic. ch. 54. The plaintiffs, therefore, in my opinion, as I understand the point submitted to us, as to this piece of road, by the terms of the special case, are entitled to a verdict for \$5, as agreed upon in the case.

GALT, J., concurred.

Judgment accordingly.

GRAHAM V. HEENAN.

Timber licenses—Intruding on Crown Lands—Trespass.

Where the plaintiff entered on lands of the Crown, in the summer months, without any right of occupation, and, no one hindering him, cut and cured hay, but was prevented from removing it by defendant, who subsequently took possession, under colour of a timber license, which however was only in force during the winter months, *Held*, that the plaintiff had no right of action against the defendant for the value of the hay so cut, the former shewing no better title than the latter.

Quare, as to the rights of licensees during the intervals between successive licenses.

TROVER for hay.

Pleas—Not guilty; and not plaintiff's goods.

The case was tried at Ottawa, before Gwynne, J.

There were certain timber limits, near the Montreal River, for which the usual timber license had been issued by the Crown to defendant; first, on 26th February, 1867, to 30th April, 1867; again, on 30th December, 1867, to 30th April, 1868; and again, on 17th March, 1869, to 30th April, 1869.

The money for this last license was paid by defendant on 1st December, 1868, but the issue of license was delayed. The Crown Land Agent (Mr. Russell) proved that the Crown always recognized the right of a previous licensee to have the limits licensed to him the next year.

It appeared there was a clearing, a farm, as it was called, on these limits, with a barn upon it. A witness proved that he worked on the farm for plaintiff, in 1867, and he had stock on it, and got the hay crop that year. In 1868 men were also employed by plaintiff to cut the hay; some six or seven tons were saved and put into the barn. In September, 1868, plaintiff sent to remove the hay, and was prevented by defendant's men, and the hay was kept and used by defendant.

On 11th December, 1866, James Graham executed an assignment, under the Insolvent Act, to Francis Clemow, official assignee. The latter was examined, and said he never knew anything about James Graham having an interest in the land. He said he sold a quantity of chattels on the farm, belonging to James Graham, to plaintiff for \$1600.

A memorandum was put in, dated September 7, 1868, signed by James Graham, "I hereby transfer all my right, title and interest to the farm or clearance and buildings, made and erected by me, on the point between, &c., &c., on the limit formerly owned by Mr. William Morris, and at present owned by James Heenan, to William Graham of Gloucester, for \$400, payable, &c.

" JAMES GRAHAM.

" Witness, Robert Skead."

A discussion, or treaty, was spoken of in the Spring of 1868, between James Graham and defendant, respecting the purchase of Graham's interest in the farm, and writings were prepared, but never executed, and nothing definite either said or done.

A witness for defence proved that in 1867 and 1868 plaintiff did cut the hay and put it into the barn. This witness lived near, and said the farm was called "James Heenan's farm."

Several objections were taken; in effect, that it was clear plaintiff had no title to the hay.

The learned Judge reserved leave to move, and told the jury to assess the value of the hay, which they did at \$396, and for this plaintiff had a verdict.

In Michaelmas Term last *O'Brien* obtained a rule on the leave reserved; that the memorandum from James to William Graham should not have been received in evidence; that it was not under seal; that the hay was cut on land contained in defendant's timber licenses, and was defendant's property; that nothing passed from James Graham to plaintiff, James being then insolvent, and his rights in his assignee.

In Hilary Term, *Harrison*, Q.C., shewed cause, and *O'Brien* supported his rule.

HAGARTY, C. J., delivered the judgment of the Court.

I can find nothing in the evidence shewing the origin of the "farm" or "clearing." All that appears is, that plaintiff, in the summer of 1867, took a crop of hay off it, and again in 1868 cut the hay in dispute here, and put it into the "barn" spoken of. Nor can I see distinctly any proof of cultivation by plaintiff of the land, nor anything to indicate that it was other than the natural marsh or Beaver meadow grass. A witness does say it was part timothy and part clover.

There was certainly no evidence whatever of any continuous possession of any part of the land by plaintiff, or any one through whom he claimed; on the contrary, when the alleged conversion of the hay took place, in September, 1868, it would appear that if any one was in possession it was the defendant and his men.

By the document put in, and the evidence on plaintiff's side, the alleged "farm" or "clearing" was certainly on defendant's timber limits; and had any of the licenses proved by defendant covered the month of September, 1868, I should at once decide against plaintiff's right to hay made from the natural grass of the limits. (See our late case of *McDonald v. Bonfield*.)*

From February, 1867, to April, 1869, the defendant had been taking out the annual license from the Crown, and it was proved that the Crown always recognize the right of a licensee to have his license renewed the next year.

* *Ante* p. 73.

All licenses expire on the 30th April, and a large gap is generally left before the new license is applied for or obtained. The license declares that the licensee may hold and occupy the location to the exclusion of all others, except as thereafter mentioned; one of the exceptions being that persons settling under lawful authority shall not in any way be interrupted in clearing and cultivating.

It strikes me forcibly that, as plaintiff's first appearance on the land harvesting hay was in 1867, and before that period it is clear the Crown had commenced giving timber licenses to defendant, if for no other reason, the plaintiff should have given some evidence of his possessing or cultivating the land, with the assent, at least, of the Crown. I think we must assume, on this evidence, that the land was ungranted Crown land, and that plaintiff shewed no rightful occupation or right to anything growing on the land. It might be quite possible for the actual settler's interest to exist coterminously with defendant's timber license; but, if so, plaintiff should have so established his case. He does nothing of the kind: he shews nothing of a continuous occupation of any kind, and it would, I think, be out of the question to presume any such occupation in the years 1867 and 1868, when we find the Crown, during parts, at least, of these years, licensing the defendant, and professing to give him the land to the exclusion of all others.

In *Henderson v. McLean* (16 U. C. 632) it is said, "that an intruder on the possessions of the Crown may maintain trespass against a wrong-doer is established by the case of *Harper v. Charlesworth* (4 B. & C. 574.)"

On turning to that elaborate judgment, we find that the plaintiff (the intruder) paid a nominal rent to the Crown, and Bayley, J. (admitting no estate had passed to the plaintiff), says, "It is useful that the party, whom the King allows to have the actual possession, should be at liberty to call to account individuals who commit trespasses on the land, rather than that the Crown should be driven to its prerogative process to punish minute tres-

passes. There is a material distinction between what is essential to be done to convey a title from the Crown, so as to take away its right, and what is necessary to be done, to confer a privilege, so as to prevent a party exercising that privilege from being a wrong-doer."

In *Henderson v. McLean* (8 C. P. 45) Draper, C. J., says: "In the absence of title there must be a possession in fact, upon which the wrong-doer trespasses."

Looking at the nature of the lumberer's work on successive licenses, it would be, in many cases, practically impossible to cut the timber and prepare and get it out within the brief period mentioned in these licenses. The possession and user of the land, we know, must be almost continuous during the year.

It is not, however, in my judgment, necessary to decide for any absolute right in the licensee in the intervals between each successive license. I only refer to it as under the facts before us, powerfully rebutting any presumption in favor of the plaintiff being considered as in possession, and defendant as a mere wrong-doer. As I read the evidence, the plaintiff is a mere intruder or trespasser on the lands of the Crown. He had no continuous or exclusive possession of any part thereof; he cut down the grass growing thereon, and made it into hay; when he goes back to remove the hay, he finds defendant apparently in possession, and successfully resisting his claim to take it.

Has defendant, then, converted the chattels of plaintiff? On the traverse of property, should the issue be found for the plaintiff?

If plaintiff had, in the summer of 1867, entered and made staves on the land and removed them, and again made staves in 1868, which staves defendant took and used, would the action lie?

My opinion is, that plaintiff shews no right of property, and if any presumption is to arise on the evidence it is stronger in favor of defendant than of him.

We must keep in mind that this is not a case of actual

possession violated by a wrong-doer. It is an apparently illegal entry on Crown land, and severing grass growing thereon. Even against another wrong-doer, I fail to see the right of property, where no possession is in fact attacked or violated. One wrong-doer enters, cuts grass, or makes staves, and leaves them on the Crown lands; another comes in his absence and takes them away, or another comes and is in apparent possession, when the maker comes and is prevented by the former from taking them.

Even a bare possession was apparently not in existence when the alleged conversion took place in September, 1868.

I think the plaintiff's case fails: that such should be the result cannot, on this evidence, be a matter of regret.

Rule absolute.

CAMPBELL AND WIFE V. GREAT WESTERN RAILWAY CO.

Action by husband and wife—Separate count by husband—Damages assessed generally—Arrest of judgment.

After a count by husband and wife for injury done to the wife during coverture, a second count, by the husband alone, after setting out the fact of the horse and cutter, in which both plaintiffs at the time were, having been precipitated over a bridge with the wife, and that she was thereby greatly injured, and laid up for a long time in consequence of the injuries sustained by her, and endured great suffering, proceeded to allege that the husband was put to great trouble and expense by reason of the loss of his wife's society and her services, and was compelled to pay and did pay large sums of money, on account of her illness, to nurses and medical men, &c., *and also* lost the said horse and cutter, and was otherwise put to great expense, &c. The jury having found for plaintiffs, and assessed damages generally on both counts,

Held, that after verdict the second count must be treated as a count only for the damage of the husband, for which he alone could sue; and that, treating it as such, it was well joined with the first count, under the Common Law Procedure Act, though damages were sought by it for the injury to the horse and cutter, as well as for that resulting to the husband from the injury to the wife.

Held, also, that defendants were not entitled to arrest the judgment on the ground that the damages had not been separately assessed upon each count.

THIS was an action against the defendants to recover damages for injuries occasioned, as stated in the first count

of the declaration, by a defective bridge, which it was alleged to have been the duty of the defendants to maintain in repair, whereby a horse and cutter, in which the plaintiffs were passing over and across said bridge, without any default of the plaintiffs, by reason of the weakness of the railing, and of the defective and unsound condition of the bridge, fell over and were precipitated upon the ground, and the plaintiff, Sementa Campbell, wife of the plaintiff Thomas D. Campbell, being in the said cutter, in consequence of the said negligence of the defendants (in suffering the bridge to get out of repair), fell over the said bridge a great distance, to wit, thirty feet, and was thereby greatly injured and had her leg broken, and was greatly disabled, and was for a long time and still remained laid up and unable to leave the house and her bed, or to attend to her ordinary business, and endured great suffering, both of body and mind.

The second count, in which the plaintiff Thomas D. Campbell sued alone, after setting out the fact of the horse and cutter having been precipitated over the bridge with Sementa Campbell, the wife of Thomas D. Campbell, as in the first count, and that she was thereby greatly injured and had her leg broken, and herself disabled and laid up for a long space of time, by reason of the injuries which she had sustained, and endured great suffering, proceeded to allege that the said plaintiff Thomas D. Campbell, was put to great trouble and expense by reason of the loss of the society of his wife and of her services, and was compelled to pay and did pay large sums of money, on account of her illness, to nurses and medical men, and for nursing and attendance, *and also* lost the said horse and cutter, and was otherwise put to great expense, and was greatly injured.

The plaintiffs under the first count claimed \$10,000, and the plaintiff Thomas D. Campbell claimed, under the second count, \$8,000.

The jury rendered a verdict for the plaintiffs, and assessed the damages generally at \$3,000.

J. H. Cameron, Q. C., obtained a rule *nisi* to arrest the judgment, on the verdict for the plaintiffs, on the following grounds: that there were two counts in the declaration, the first by both of the plaintiffs, as husband and wife, for an injury done to the wife during coverture, and the second by the husband alone for causes of action intended to be claimed as accruing to him alone, whereas, as he contended, the second count claimed damages also for injuries and torts done to the person of the wife; and also because damages should have been, but were not, assessed on each count separately.

McMichael shewed cause to the rule. He contended that there could be no arrest of judgment unless the second count was so bad that it contained in itself two irreconcilable causes of action, which he urged that it did not, but that the account therein of the injuries sustained by the wife was merely introductory to the cause of action of the husband alone occasioned thereby, namely, the loss of her society and services, the expense of her medical attendance, &c., &c., to which was added the loss of his horse and cutter. He cited *McGregor v. Graves*, 3 Ex. 34; *Russell and Wife v. Come*, 1 Salk. 119; *Dicks v. Brooke*, 1 Str. 60; B. & L. ed. of 1868, 340, Form; *Cahill v. McDonell*, 13 Ir. C. L. Reps. 481; *Abbott and Wife v. Blofield*, Cro. Jac. 644; *Morris v. Moore*, 19 C. B. N. S. 359; *Davies v. Davies*, 31 L. J. Ex. 476,

Cameron, Q. C., contra.

GWYNNE, J., delivered the judgment of the Court.

The second count, as it appears to me, is a count for the damages of the husband alone. If it stood by itself it could not be said that damages were sought to be recovered therein in respect of the personal injuries sustained by the wife. If, after the narrative of the injuries sustained by the wife, the word "whereby" was introduced, the case would be very similar to *Stone v. Jackson* (16 C. B. 199). There, to a count for injury to the wife, the action being brought by husband and wife, was added a count at

the suit of the husband alone, wherein, after setting forth the injury to the wife, as in the first count, thus, "that by means of the premises, and for want of proper and efficient guarding, fencing off, and railing in the same, the said Anne Stone, then being the wife of the said George William Stone, and who was lawfully using the said foot-way, and employing ordinary caution in the use thereof, slipped and fell into the said hole, vault, pit, or cellar, *and was thereby grievously bruised and injured*, and so remained and continued for a long space of time, whereby the said George William Stone, during all that time, lost and was deprived of the comfort, benefit, and assistance of his said wife," &c., &c.

To this there were several pleas, and the jury found a general verdict for the plaintiffs, with £30 damages.

There was a new trial moved upon the main question, namely, whether the place where the accident occurred was a public way where the plaintiff's wife had any right to be, but no objection was taken as to the frame of the counts or the assessment of damages.

Now, in the case before us, the second count commences, "And the said Thomas D. Campbell also sues the said Great Western Railway Company for that," &c., &c., indicating very plainly that what is intended to be set out in the count is a cause of action of Thomas D. Campbell alone. Upon such a count, then, in a declaration, it appears to me to be very plain that no damages could be given in respect of the injury sustained by the wife, nor for anything but the husband's own separate cause of action. I am inclined to think that the count is not open to the imputation of being defective on demurrer, as disclosing a cause of action for injury sustained by the wife, coupled with damage for which the husband can alone sue; but after verdict I think we must, without doubt, hold this second count to be a count only for the damage of the husband, for which he alone could sue.

Treating it as such a count, it is well joined with the first count under the Common Law Procedure Act, although

damages are sought for the injury to the horse and cutter as well as for the injury resulting to the husband from the injuries sustained by the wife: *Hemstead et Ux v. The Phoenix Gaslight and Coke Co.* (3 H. & C. 745); *Morris and Wife v. Moore* (19 C. B. N. S. 359).

In this latter case the jury assessed the damages at the trial separately, but from the report of *Stone v. Jackson*, in 16 C. B., it appears that they did not do so in that case. In *Siner v. Great Western Railway Co.* (L. Rep. 3 Ex. 150, and in Error, 4 Ex. 117) there were also the two counts, for injury to the wife and the husband's damage by loss of her society, &c., &c., and single damages assessed, and although the case was brought to a Court of Error it was not objected that the damages were not assessed separately.

The 75th sec. of the Common Law Procedure Act (Consolidated Statutes) enacts that "in any action brought by a man and his wife, on *any* cause of action accruing personally to the wife, in respect of which they are necessarily co-plaintiffs, the husband may add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the Court or a Judge thinks fit; but in case of the death of either plaintiff, such suit shall abate so far as relates to the causes of action, if any, which do not survive."

This is different from the clause in the English Act (15 & 16 Vic. ch. 76). Sec. 40 of that Act enacts that "in any action brought by a man and his wife *for an injury* done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right," &c.

In a note to *Hempstead et Ux v. The Phoenix Gaslight and Coke Co.* (3 H. & C. 745), extracted from *Day's Common Law Procedure Act*, is given the material part of the Report of the Commissioners, which was the occasion of this clause, as follows: "We do not propose, except in the case of husband and wife, that causes of action accruing to the plaintiff in different rights should be joined. The funds to which the sums recovered in such cases would be

applicable, and the judgment with respect to such, would be different, from which inconvenience might arise; *but* with respect to the joinder of a cause of action arising to a husband in his own right, *with one accruing to him in respect of his wife, as the judgment, in the event of his recovering a verdict, and the fund to which the judgment would be applicable, would be the same*, we see no objection to permit the joinder, in order to prevent the necessity of bringing two actions in respect possibly of a cause of action arising out of the same transaction, *as for instance, where an injury has been done to the wife and the husband by the same wrongful act.* We have provided for the only difficulty which occurs to us as likely to arise in the case of the death of either party, by proposing that the suit should continue as to such part of the cause of action as would survive, and abate as to the rest."

Now, in respect of any damages in this action under the first count, when reduced to judgment, they become the property of the husband: *Harris and Wife v. Almond* (4 Dowl. P. C. 321). After judgment, then, these damages will be held by him as his own property, to the same extent as the damages recovered by him under the second count. It is therefore in the interest of the husband that where counts of this nature are joined, the necessity arises for separate damages being assessed, to avoid the difficulty contemplated by the Common Law Commissioners, namely, the death of either party before judgment. If, in the present case, either party should die before judgment, there being no separate damages assessed, the result, I apprehend, would be that *the whole action* would abate, for there are no damages attributable to such portion of the cause of action as should survive for which judgment could be entered: the action would therefore have to abate wholly. But, if the husband is willing to run this risk, I do not see upon what principle the defendants can move in arrest of judgment, because the damages have not been separately assessed upon each count. When the judgment shall be entered upon this verdict, all the damages which the jury

may have assessed or allowed to the husband, in respect of the injury to the wife complained of in the first count, equally with such damages as they may have allowed in respect of the husband's own sole damage complained of in the second count, will belong to the husband, and so, as it appears to me, the judgment being entered before the death of either party will cure the presently apparent defect arising from the damages not having been assessed separately. Unless, therefore, *the plaintiffs* should desire a *venire de novo*, the rule should, in my opinion, be discharged with costs.

ROE V. BANK OF BRITISH NORTH AMERICA.

Insolvency—Payment after attachment issued—Right of assignee to recover.

Held, following *Roe v. Royal Canadian Bank*, 19 C. P. 347, that the assignee in insolvency was entitled to recover from defendants moneys paid by the insolvent to the defendants after a writ of attachment, though unknown to defendants, had issued against the insolvent.

THIS was an action by the plaintiff, as official assignee in insolvency of the estate of one James W. Henry.

The declaration was on the common money counts for money had and received by defendants to the use of plaintiff, as such assignee, and for interest.

The defendants pleaded, except as to \$15.79, never indebted, and as to that sum a tender before action and payment into Court.

Issue, on the first plea, and replication as to the second, claiming a larger sum than that tendered, upon which defendants took issue.

The case was tried at the last Fall Assizes, at Toronto, before Morrison, J.

It appeared at the trial that on 19th December, 1866, the defendants, through their agent at Toronto, had cashed for the insolvent what was called a "demand draft," on

certain correspondents in New York, for \$1701 06, and that this draft coming back within three or four days dishonored, the insolvent, on 26th of the same month, called at defendants' office and deposited to his own credit a sum of cash and the proceeds of a small note payable to the insolvent, and then discounted by the defendants, and thereupon drew a cheque against his account in favor of defendants for the amount of the demand draft, which he handed over to them. Before, however, this transaction of the 26th December, and on the morning of the same day, a writ of attachment, but unknown to the defendants, had issued against the insolvent at St. Thomas, at the suit of certain creditors, and the plaintiff, as assignee, claimed to be entitled to the whole amount at the insolvent's credit with the defendants on that day, the defendants, on the other hand, contending that all the assignee could claim was the balance at the insolvent's credit after paying their claim on account of the demand draft, and this balance they accordingly paid into Court.

The learned Judge charged the jury that if they found the money paid by the insolvent to defendants was the same money previously received by the insolvent from them, they should find for defendants; or, that it was evidence to go to them that it was defendants' money and not the insolvent's on the morning of 26th December.

The jury found for defendants.

In Michaelmas Term last, *S. Richards*, Q.C., obtained a rule to set aside the verdict and for a new trial on the law and evidence, on the ground that the money received by defendants from the insolvent, and the proceeds of the note discounted, were the moneys of plaintiff; also because of the reception of improper evidence, in receiving a statement made by the insolvent, after the issue of the attachment, as evidence against defendants as to the identity of the money received by defendants; also on the ground of misdirection in charging the jury, as above noted, &c.

This term, *Harrison*, Q.C., and *McMichael*, shewed cause, citing *Sharpe v. Newsholme*, 5 Bing. N. C. 713; *Milne v. Leister*, 7. H. & N. 786; *Toovey v. Milne*, 2 B. & Ad. 683; *Alsager v. Currie*, 12 M. & W. 751; *Churcher v. Cousins*, 28 U. C. 548.

Richards, contra.

GWYNNE, J., delivered the judgment of the Court.

This case must be governed by *Roe v. The Royal Canadian Bank*, in this Court, 19 C. P. 347. The plaintiff is, in our judgment, entitled to recover the money paid by the insolvent to the bank, as well as the amount of the proceeds of the note discounted on the 26th December, 1866, all of which was, under the circumstances, the property of the assignee at the time it was received by the defendants. The rule will therefore be absolute for a new trial without costs.

Rule accordingly.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—THOMAS JAMES CECIL GREENE, JOHN GREEN, JOHN CAMERON, JOSEPH HENRY FERGUSON, JAMES WATSON HALL, FREDERICK CHARLES DENISON, THOMAS DAWSON DELAMERE, ARTHUR JAMES MATHESON, HENRY JOSEPH LARKIN, ROBERT OLIVER, JOHN BARRY, ARCHIBALD HENRY MACDONALD, PETER FERGUSON, JOSEPH EASTON MCDUGALL.

Regulae Generales

As to the Jurisdiction of the Clerk of the Crown and Pleas of the Court of Queen's Bench.

HILARY TERM, 1870.

Whereas, by the Statute made and passed in the Session of the Legislature of Ontario, held in the thirty-third year of the reign of Her Majesty, entitled, "An Act respecting Proceedings in Judges Chambers at Common Law," it is enacted that it shall be lawful for a majority of all the Judges of the said Courts, which majority shall include the two Chief Justices, or one of the Chief Justices and the senior of the Puisne Judges of the Superior Courts of Common Law, from time to time, to make and publish general rules for certain purposes therein mentioned.

It is therefore ordered that the Clerk of the Crown and Pleas of the Court of Queen's Bench be and is hereby empowered and required to do all such things, and transact all such business, and exercise all such authority and jurisdiction in respect of the same as by virtue of any Statute or custom, or by the rules and practice of the said Courts, or any of them respectively, were, at the time of the passing of the said Act, and are now done, transacted, or exercised by any Judge of the said Courts sitting at Chambers, except in respect of matters relating to the liberty of the subject, and to prohibitions and injunctions, and except (unless by consent of the parties) in respect of the following proceedings and matters, that is to say :

All matters relating to criminal proceedings.

The removal of cases from inferior Courts other than the removal of judgments for the purpose of having execution.

The referring of causes under the Common Law Procedure Act.

Reviewing taxation of costs.

Staying proceedings after verdict.

Appeals in insolvency.

In all such excepted matters, not being matters relating to the liberty of the subject, the said Clerk may issue a summons returnable before a Judge.

That in case any matter shall appear to the said Clerk of the Crown to be proper for the decision of a Judge, the Clerk may refer the same to a Judge, and the Judge may either dispose of the matter, or refer the same back to the Clerk, with such directions as he may think fit.

That appeals from the Clerk's order or decision shall be made by summons, such summons to be taken out within four days after the decision complained of, or such further time as may be allowed by a Judge or the said Clerk.

The appeal to be no stay, unless so ordered by a Judge or the said Clerk.

The costs of such appeal shall be in the discretion of the Judge.

That the scale of costs, for all matters done by and before the Clerk, shall be the same as are fixed for business done by and before the Judges.

That the same fees shall be taken in respect of business transacted before the said Clerk at Chambers as are now taken when the same business is transacted before a Judge.

That these rules take effect on the twenty-first day of February, A.D., 1870.

(Signed)	JOHN H. HAGARTY, C.J., C.P.
"	JOS. C. MORRISON, J.
"	ADAM WILSON, J.
"	JOHN W. GWYNNE, J.
"	THOMAS GALT, J.

EASTER TERM, 33 VICTORIA, 1870.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

MARSHALL V. SMITH.

*Promissory note—Statute of Limitations—Written acknowledgment—
Subsequent holder.*

Held, that a memorandum in writing, signed by the maker of a promissory note, admitting the amount to be due to the payee, which, in the opinion of the Court, was sufficient, in an action by the payee, to prevent the operation of the Statute of Limitations, enured to the benefit of a subsequent holder of the note.

DECLARATION on a note, dated 26th February, 1858, made by defendant to William McLaggan, or bearer, at three days, of which plaintiff became bearer.

Pleas—Non fecit, Statute of Limitations, payment, and a special plea, on which nothing turned.

The case was tried at Stratford, before Hagarty, C.J.C.P.

At the foot of the note there was this memorandum, signed by defendant: “February 22, 1864.—I acknowledge the above note a debt due by me, less what may have been paid on the same.—WILLIAM SMITH.”

It was objected that the memorandum did not contain a promise, and if it did, it only enured to the benefit of McLaggan, the then holder, and not to plaintiff, who afterwards became the bearer. The plaintiff had a verdict, but leave was reserved to defendant to move to enter a nonsuit on this objection.

In Easter Term, *Idington* obtained a rule on the leave reserved, to which *Robert Smith* shewed cause, citing *Cripps v. Davis*, 12 M. & W. 159; *Gale v. Capern*, 1 A. & E. 102; *Byles on Bills*, ed. of 1866, 346; *Addison*, Contracts, ed. of 1869, 1013; *Cowing v. Vincent*, 29 U.C.R. 427; *Tanner v. Smart*, 6 B. & C. 602.

Idington, contra cited, *Rolleston v. Dixon*, 2 D. & L. 892; *Cowley v. Furnell*, 12 C. B. 291; *Edwards v. Culley*, 4 H. & N. 373.

HAGARTY, C. J.—That the acknowledgment is sufficient, being unconditional, and importing, as the law intends, a promise to pay, is clear from many cases. I need only cite *Cockrill v. Sparks* (1 H. & C. 699); *Lee v. Wilmot* (L. R. 1 Ex. 364), and, in this Court, *Gemmell v. Colton* (6 C. P. 57).

The other point requires more notice. It would seem that the main foundation of the objection is the Reporter's note, in the form of a query at the head of the case of *Cripps v. Davis* (12 M. & W. 159). There is no decision by the Court on this question, the case going off on another point. The counsel took the objection. Parke, B., says: "The promise was made to Lediard (the payee) after the notes were due, he then being the holder. Afterwards he transfers them to the plaintiff. That promise created a new debt to the holder to whom it was made. Then the question is, whether that promise does not so attach itself to the debt upon the notes as that it was transferred to the indorsees. * * * It must be a promise to pay, or an acknowledgment from which a promise is to be inferred, and that must support the promise laid in the declaration." Again, speaking of the memorandum signed by the defendant to the then holder, he says: "*Primâ facie*, it satisfies the statute; but when the other evidence is given it shews that the document was drawn up with a view to the debt upon the notes being paid in a particular way, namely, by setting it off against so much of the debt due from Lediard (the holder)."

I would rather infer from this case, that had it turned

merely on the point now before us, the plaintiff would have had judgment.

Gale v. Capern (1 A. & E. 102) was there cited. Sir J. Patteson says: "If an acknowledgment had been made within six years to the then holder, does it not follow from the negotiable nature of the instrument that a subsequent holder may avail himself of the acknowledgment in an action upon the note?"

Edwards v. Culley (4 H. & N. 373) shews that an acknowledgment to a stranger will not suffice. Martin, B., points out that an acknowledgment would not import a promise to pay, which is the necessary implication.

In the last edition of *Byles on Bills*, 345, it is said: "So an acknowledgment to a prior holder of a bill or note enures to the benefit of a subsequent holder," citing *Gale v. Capern*, and in the note adding, "but see *Cripps v. Davis*."

Addison on Contracts (ed. 1869) 1013: "Some doubt seems to have been entertained as to whether an acknowledgment in writing, signed by defendant, of his liability on a bill or note, will enure to the benefit of a subsequent indorsee or holder. It is apprehended that it would do so," citing the above two cases.

Chitty on Contracts (1868) 762, says it is still a vexed question, but merely cites the two cases.

On the reason of the thing, I am of opinion that such an acknowledgment is sufficient. The note is a promise to pay A. B., or bearer. The defendant writes at the foot an acknowledgment that it is a debt due by him. The law from this implies, I consider, a promise to pay the then or any subsequent holder, according to the tenor of the note. The note acquires, as it were, a new vitality, and I think any lawful holder can avail himself of the acknowledgment to prevent the operation of the Statute of Limitations.

GWYNNE, J.—The only question here is, whether a written acknowledgment, whereby the maker of a promissory note admits the amount to be due to the payee, which is sufficient,

in an action at the suit of the payee, to prevent the operation of the Statute of Limitations, as a defence, can enure to the benefit of a subsequent indorsee. The only doubt upon the point arises from the argument of counsel in *Cripps v. Davis* (12 M. & W. 165), for the point was not decided by the Court. From the observations of Parke, B., in the course of the argument, it is plain that he did not concur in the argument of the learned counsel for the defendant. The argument of defendant's counsel was that, if the operation of such an acknowledgment was merely to shew that the original debt remained unpaid, and to revive it, then it might enure to the benefit of the subsequent indorsee; but if, as he contended, it was a new promise, upon the authority of *Tanner v. Smart* (6 B. & C. 602), then, he submitted, it could not enure to the benefit of a subsequent indorsee, but must be sued upon by the promisee only.

Now, *Tanner v. Smart* was the case of a conditional promise, which could not support an absolute promise laid in the declaration, upon the principle which had been established by former decisions, that the promise which is given in evidence under the general replication to the Statute of Limitations must be one which is consistent with the promise laid in the declaration. So in *Haydon v. Williams* (7 Bing. 163) it was held that such a promise, if conditional, must be declared upon as such.

Now, upon issue taken upon the plea of the Statute of Limitations to the declaration in this case, the point in issue is, whether the action did accrue, or the plaintiff did promise, as alleged in the declaration, within six years; and the acknowledgment which is relied upon as defeating the operation of the statute, being absolute and not conditional, it appears to me to be of no importance whether the operation of such acknowledgment is to revive the old debt or to constitute a new promise. "The Courts," says Bramwell, B., in *Sidwell v. Mason* (2 H. & N. 306), "hold that a cause of action arose when the new promise was made." Now, what cause of action is it that arises when

the new promise is made? Why, clearly, as it seems to me, that upon *the note* declared on, and not a new cause of action *upon* the new special promise, which can be sued for only by the promisee, and must be declared upon specially. It is *upon the count* on a bill or note that the recovery takes place, even where the new promise or acknowledgment, which defeats the operation of the statute, entitles the plaintiff to recover a balance only: *Dabbs v. Humphries* (10 Bing. 446); so that, when the new promise or acknowledgment is absolute, it is *upon* the bill or note declared upon, and *not upon* the new promise, which only appears in evidence, that the recovery takes place.

The essential condition which entitles the plaintiff to recover in an action on the bill or note is, that the new promise, or that which is involved in the new acknowledgment, supports the promise laid in the declaration. Now the promise laid in the declaration is, that the maker promised to pay the payee on a day which is past, and the declaration avers the transfer of the instrument to the indorsee, and that the defendant, the maker, has not paid the note. The acknowledgment which defeats the operation of the statute was made to the payee. Taking it to involve a new promise, it is a new promise, as it appears to me, of a like nature as that which was contained in the note, namely, to pay the payee or his order. Strictly speaking it does not revive the note in every particular, which was to pay on a day past, at the time the new promise was made, but, as I take it, the new promise is a promise to pay *that note* upon request to the payee or his order. This was the view of Patteson, J., in *Gale v. Capern* (1 A. & E. 104), and of Parke, B., in *Cripps v. Davis*. The effect of the new promise was, as it appears to me, to establish the accrual of a cause of action *upon the note* in the payee, dating from the period of the new promise, and left the note available to the payee, with its negotiable quality still attached to it.

GALT, J., concurred.

Rule discharged.

HOOD V. GRAND TRUNK RAILWAY COMPANY.

Railway Co.—Special contract for carriage—Non-liability—Pleading.

To a declaration against defendants, setting out a special contract entered into with plaintiff to carry certain cattle, whereby plaintiff undertook "all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, *and otherwise, no matter how caused,*" and alleging the consequent duty on defendants' part to furnish suitable and safe carriages, and the breach of such duty, whereby some of the cattle were killed and others injured, defendants pleaded this special contract, and that while said cattle were being so conveyed a door of one of the cars became open, and some of the cattle fell out and were injured :

Held, on demurrer, a good plea, and that (following *O'Rorke v. G. W. R. Co.*, 23 U. C. 427) the terms of the special contract protected defendants against liability for the damage caused by the accident mentioned in the plea.

DECLARATION, that defendants, in consideration that plaintiff would deliver to defendants, as and being carriers for hire, certain cattle to be carried for reward, subject to a consideration that plaintiff would undertake all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, and otherwise, no matter how caused, defendants undertook to carry said cattle from Guelph to Toronto, subject to such condition, and thereupon it became and was the duty of defendants to provide suitable and safe carriages ; yet defendants, negligently, and in violation of their duty, placed and conveyed said cattle in unsuitable and dangerous carriages, and certain cattle were killed and others injured.

Plea, that said cattle were received by defendants from plaintiff on a special contract, whereby plaintiff undertook all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance and otherwise, no matter how caused ; that said cattle were delivered to defendants and received by them only on said condition ; and that while in the course of conveyance, under said special contract, one of the doors of said cars became open, and some of said cattle fell therefrom and were damaged.

Demurrer, 1st. That said plea did not traverse or confess and avoid the said count; 2nd. Not averred in said plea that cattle were not lost by negligence of defendants in not providing proper carriages; 3rd, That said plea did not shew that defendants performed the duty arising from the contract alleged in said count, or aver that said cattle were not lost in consequence of defendants' non-performance of said duty.

Anderson, for the demurrer, cited *Shaw v. The York and North Midland R. W. Co.*, 13 Q. B. 347.

M. C. Cameron, Q.C., contra, was not called upon by the Court.

HAGARTY, C. J., delivered the judgment of the Court.

We cannot distinguish this case from *O'Rorke v. Great Western Railway Co.* (23 U. C. R. 427), as to the protection given to the Company by a condition like that pleaded. The loss there happened from the same cause as here, viz., the cattle falling through the door of the car, which from some cause or other became unfastened; the only difference is, that in the present case there is a demurrer.

Mr. Anderson urged that this case was distinguishable, as the declaration charges the breach of duty to be in putting the cattle in unsuitable and dangerous carriages. We cannot destroy the effect of the condition, whatever it may be, merely by a verbal alteration in the words of a declaration. The substance of the matter is, did the plaintiff, by the condition, take on himself "all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance and otherwise, no matter how caused?" If he did, we think it clear that such a condition protects the defendants from such a loss as is stated on the record, viz., the opening of the door from some cause on the journey, and the falling of the cattle therefrom. If the Company must remain liable for the giving way of a pin or bolt fastening a cattle car door, the condition would be practically worthless to them.

Lord Denman's remark, in 1849, in *Shaw v. York and Midland Railway* (13 Q. B. 347), relied on by Mr. Anderson, is noticed in subsequent cases, but we cannot find that it has been acted on.

McManus v. Lancashire Railway (2 H. & N. 693) was an action for not providing proper trucks for the cattle. The condition was similar to that in our case, and was so pleaded. Judgment was given for defendants, Lord Denman's remark being cited in argument. The judgment was reversed in Error (4 H. & N. 327), on the ground that the condition was not just and reasonable under the Railway Traffic Act (17 & 18 Vic. ch. 31).

We would also refer to *Gregory v. West Midland Railway Co.* (2 H. & C. 944); *Peek v. North Stafford Railway Co.* (10 H. L. 473); *Rooth v. North-Eastern Railway Co.* (L. R. 2 Ex. 173); *Carr v. Lancashire and Yorkshire Railway Co.* (7 Ex. 707).

Judgment for defendants on demurrer.

LYMAN V. LOVEKIN.

Promissory note—Note signed by defendant as President of Company.

A promissory note, in this form,

"DURHAM WOOLLEN MANUFACTURING COMPANY, LIMITED.

"Capital 40,000.

"\$439 $\frac{30}{100}$

"Toronto, August 18th, 1868.

"Three months after date promise to pay to the order of Lyman, Elliot & Co., at the Canadian Bank of Commerce, in Toronto, the sum of \$439 $\frac{30}{100}$, value received

J. P. LOVEKIN,

"President,"

was drawn up by plaintiffs, in payment of goods sold and delivered by them to the Company, and intended to be the note of the Company, and when signed by defendant, as president, was delivered to plaintiffs and received by them as the note of the Company, with the blank before the word "promise" not filled up; moreover, on default in payment, the note was charged to the Company:

Held, that the promise was that of the Company, and that defendant was not personally liable.

ACTION against defendant as maker of two promissory notes, payable to plaintiff's order.

Plea—Non fecit.

At the trial, at Toronto, before Wilson, J., two notes were produced, dated respectively August 18, 1868, and October 19, 1868.

They were in this form :

“DURHAM WOOLLEN MANUFACTURING CO., LIMITED.

“CAPITAL, \$40,000.

“No.

Due Nov.

“\$439 $\frac{30}{100}$.

“*Toronto*, August 18, 1868.

“Three months *after date* promise to pay to the order of *Lyman, Elliot & Co.*, at the Canadian Bank of Commerce, in Toronto, the sum of four hundred and thirty-nine $\frac{30}{100}$ dollars, *value received.*

“J. P. LOVEKIN,

“President.”

The words in *italics* were printed, the rest written.

The second note was for \$242.90, in precisely the same form, written and printed, the signature being “J. P. Lovekin, President Durham Woollen Manufacturing Co. Limited.”

It appeared that there was a Company of the name mentioned, at Newcastle, and defendant was its President and that the Company had many dealings with plaintiffs purchasing goods from them.

The first of the notes appeared to have been prepared by plaintiffs and sent with the invoices of goods to the Company for signature. The invoice was :

“THE DURHAM WOOLLEN MANUFACTURING CO., Newcastle,

“To *Lyman, Elliot & Co.*, Dr.,”

setting out parcels of goods to

	\$439 15.
Stamps	0 15
	<hr/>
	\$439 30

and then the words

“Oblige by returning enclosed note, signed.

“L. E. & Co.”

Another bill from plaintiffs was produced :

“ THE DURHAM WOOLLEN MANUFACTURING CO.,

To *Lyman, Elliot & Co., Dr.*

“ 1868, Nov. 21. Cash paid your note \$439 30

“ A remittance of the above will oblige.

“ L. E. & Co.”

A subsequently rendered account was also produced, headed in same way, charging both the notes sued on to each, as, “Cash paid your note.”

The *Canada Gazette*, 1866, announced that the Durham Woollen Manufacturing Company was duly incorporated under chapter 63 of Canada. It was proved that defendant was the President of the Company, and that he had been in the habit of signing notes for the Company, with the knowledge of the Board.

The plaintiff insisted that defendant was personally liable.

A verdict was taken for plaintiffs, with leave to defendant to move to set it aside and enter a verdict for defendant.

In Hilary Term last, *Moss* obtained a rule accordingly, to which, this term, *K. McKenzie*, shewed cause, citing *Aggs v. Nicholson*, 1 H. & N. 165; *Lindus v. Melrose*, 2 H. & N. 293; *Penrose v. Martyr*, E. B. & E. 499; *Owen v. VanUster*, 10 C. B. 318; *Armour v. Gates*, 8 C. P. 548; *Foster v. Geddes*, 14 U. C. 239; C. S. U. C. ch. 63; C. S. C. ch. 60.

Moss, contra, referred to *City Bank v. Cheney*, 15 U. C. 400; *Robertson v. Glass*, 20 C. P. 250.

HAGARTY, C. J.—We had occasion to review some of the cases bearing on this question in the case decided last term of *Robertson v. Glass* (20 C. P. 250). In addition to the cases there cited we have examined *Leadbitter v. Farrow* (5 M. & S. 345); *Owen v. VanUster* (10 C. B. 318); *Bank of Montreal v. Smart* (10 C. P. 15); *Armour v. Gates* (8 C. P. 548); *Foster v. Geddes* (14 U. C. 239);

City Bank v. Cheney (15 U. C. 400); *Aggs v. Nicholson* (1 H. & N. 165).

We think the case before us is freed from many of the legal difficulties suggested in the numerous cases by the peculiar wording of the notes. As we read the notes, the promisers are clearly the Durham Woollen Manufacturing Company, and not the defendant. There is no other nominative case to the verb "promise:" in each note the blank before the latter word is not filled up. The plaintiffs themselves prepared the first note certainly, and, we would infer from the evidence, the second note also. They declared at the time they were dealing with the Company for goods debited to them, not to the defendant. They left the blanks before the word "promise," and wrote at the top the name of the Company.

It seems transparently clear to us that at the time plaintiffs took these notes they had no idea that they were other than the notes of this Company. We ought, we think, to feel beyond reasonable doubt, that the law is inflexibly with plaintiffs, before we can give an effect to the contract wholly different from the meaning of the parties.

In *Aggs v. Nicholson* the note was, "We, two of the directors of the Ark Life Insurance Company, by and on behalf of the said society, do hereby promise to pay, &c. (Signed) Charles Nicholson, H. Wood;" and then the seal of the Company.

It was pressed on the Court that unless it was the defendants' note it was void, and the maxim "*ut res majis valeat quam pereat*" was cited. Pollock, C. B., says, in giving judgment for the defendants: "Looking only to the meaning of the words used, we think they purport to bind the Company, and not the parties signing. Nobody doubts that that was the real intention, and why the law should regard popular language otherwise than popularly it is difficult to see, in this case at least. Had the words been, 'We the society promise,' signed 'P. N., H. W., for the society,' or 'on behalf of the society,' it would have

been clear. * * * We are of opinion that, even if void against the Company, the note is not therefore to be held good against the defendants. There is no estoppel."

In that case there was a special plea setting forth the facts, shewing that defendants signed, as being two of the directors, on behalf of the Company, and not with the intention of binding themselves, &c.; that they were duly authorized so to do for the Company, and that plaintiff had notice of the premises. This plea was held a good defence on demurrer. The judgment does not seem to turn on the fact of there being a seal to the note. The suit was by an indorsee. The law is fully examined, and the case of *Aggs v. Nicholson* adopted in *City Bank v. Cheney* (15 U. C. R. 400).

As to the Company's power to make notes, Sir J. Robinson says: "We have decided expressly, in the *Kingston Marine Railway Company v. Gunn* (3 U. C. R. 368), and have in other cases generally assumed, that a trading corporation, such as this (a telegraph company), may make promissory notes in the course of transacting their proper business."

The recent case of *Alexander v. Szner* (L. R. 4 Ex. 102) is also, we think, in defendant's favour. Mr. McKenzie urged that, whatever may be in the body of the note, the defendant is liable if he sign it; in other words, if a note be made, "John Doe promises to pay to H. B.," &c., and Richard Roe puts his name to it, as maker, he is bound.

No authority is cited for this, and we cannot but hesitate in accepting it as law.

In *Davis v. Clarke* (6 Q. B. 16) John Hart drew a bill payable to himself, or order, addressed to John Hart. Clarke wrote across it, "Accepted, H. J. Clarke," and it was held Clarke could not be sued as acceptor of a bill of exchange addressed to him. Lord Denman says: "There is no authority, either in the English law or in the general law merchant, for holding a party to be liable as acceptor upon a bill addressed to another." The same doctrine is laid down in *Polhill v. Walter* (3 B. & Ad. 114).

Under the Joint Stock Company Act (Consol. Stat. Canada, ch. 63, sec. 57) a company is directed to have their name, style, and capital at the head of every promissory note, draft, &c., purporting to be made or signed by any trustee or officer of the Company, or in any way to oblige or bind the said Company, and the trustees shall be personally liable for every contract, &c., made in the name of the Company, by virtue of any document at the head of which the same has not been written, &c.

Sec. 7 makes the notice in the *Canada Gazette* conclusive proof of compliance with the statutable formalities prescribed for the formation of the Company.

I am of opinion that the notes sued on are not the notes of the defendant, but the notes of the Company; that this defendant does not promise or contract to pay; that neither the plaintiffs nor the defendant, when the notes were made, contracted for or intended to contract for any personal responsibility of defendant, and that the rule to enter verdict for defendant must be made absolute.

GWYNNE, J.—The Durham Woollen Manufacturing Company, Limited, is a Company duly incorporated under chapter 63 of the Consolidated Statutes of Canada.

The notes declared upon in this suit were drawn out by the plaintiffs themselves—in the manner required by law to make promissory notes binding upon the Company—in payment for goods sold and delivered by the plaintiffs to the Company, and for the express purpose of being the notes of the Company. They were signed by the defendant as President of the Company, and when so signed were delivered to the plaintiffs, and received by them *as* and *for* the notes of the Company. When they became due and were not paid, they were charged directly by the plaintiffs to the Company for their default in not paying them. The defendant does not in words, upon the face of the notes, promise to pay: the word “I” before “*promise*” is plainly intentionally omitted, and the notes are so drawn as to be capable of being read, as they were intended by

the plaintiffs to be, the promises of the Company. Under these circumstances, there can be no doubt that neither upon principle nor authority can these notes be held to be the notes of the defendant, so as to make him personally liable.

GALT, J., concurred.

Rule absolute.

THE CORPORATION OF THE TOWNSHIP OF BARRIE V.
GILLIES ET AL.

Road allowances—By-law of municipality—Right of action against timber licensees.

After the passage of by-laws by a municipality, in accordance with the statute in that behalf, (29 & 30 Vic. ch. 51), for the preservation of the timber on government road allowances, such municipality may maintain an action against timber licensees of the Crown for cutting such timber, even though the licenses were granted before the passage of the by-laws, the licensees at the time of cutting having had notice of the by-law.

Quære, whether such licenses confer the right to cut timber on the road allowances; *Semble*, not.

THIS was an action against the defendants, as licensees of the Crown, for cutting timber on the original road allowances, surveyed and laid out on the survey of the township of Barrie, in 1856.

The defendants pleaded not guilty, and that the timber was not the property of the plaintiffs; also, leave and license, and payment.

The following facts appeared:

The township of Barrie was surveyed in the year 1856, under instructions from the Commissioner of Crown Lands. In this survey concession roads were surveyed, and also road allowances along every fifth lot and round certain lakes. The manner in which the roads round lakes were laid down was this; at the extremity of every road which, if produced, would intersect the lake, and at either side of such road, at the distance of 66 feet from high

water mark, a post was planted and the roads were all delineated on the map of the survey. Prior to June, 1864, the united townships of Barrie and Clarendon constituted a municipality in the county of Frontenac. In June, 1864, Clarendon was separated from Barrie, leaving Barrie a single township municipality. On the 1st May, 1867, Crown timber licenses, numbered, respectively, 16, 19, 20, 21, and 22, were granted to the defendants, expiring on the 30th April, 1868. These licenses cover the whole township of Barrie, east of a line in continuation of the division line between Kaladar and Kennebeck, until it intersects the Mississippi river; bounded on the west by the Mazinau lake and the waters of the Mississippi river, and the line above mentioned to the easterly boundary of the township and beyond the township. There is no exception of road allowances from the licenses. On the 6th July, 1867, the municipal council of the township passed a by-law to protect the timber on these allowances, a copy of which was filed. On the 17th August, 1868, the licenses, numbered respectively, 16, 19, 20, 21, and 22, were renewed until the 30th April, 1869.

At the close of the plaintiffs case the following objections were taken by the defendant to the plaintiffs right to recover:

1st. That the plaintiffs' had shewn no such right or title in the property claimed, or in any of it, as would enable them to recover in this suit, the freehold of the road allowances not being in them, but in the Crown. 2nd. That there was no sufficient evidence of an original survey laying out the road allowances claimed; that this should have been proved by the record in the Crown Lands Department, or a copy certified by law. 3rd. That there was no evidence that Perry's survey was adopted by government, or that patents were issued according thereto. 4th. That there was no evidence of dedication of the road allowances by user, and that there was no evidence that the road allowances were taken possession of by plaintiffs, *or opened or used* as public roads. 5th. That the defend-

ants had a right to cut the timber under their licenses which covered the land in question. 6th. That the reservation along the lakes were not road allowances within the provisions of the Municipal Act, and were never laid out or defined on the ground. 7th. *That the Municipal By-law could not abridge the rights of the Crown to dispose of the timber on the road allowances, nor could the Municipal Act do so, not being empowered for that purpose, the Crown not being named in the Act.* 8th. That at all events the defendants were protected by their licenses issued before the passing of the by-law for all timber cut under such licenses, that is, in the winter of 1867 and 8.

The question was, were the plaintiffs entitled to recover for any, and if any, which of the amounts found by the jury?

In answer to certain questions submitted to the jury, they found that in the winters of 1867, 1868 and 1869, the defendants cut upon the side lines and concession roads in the township 573 trees. 2nd. Of the value of \$429.75. 3rd. That of this number two-thirds were cut in the winter of 1868 and 1869. 4th. Equal in value to \$286.50. 5th. That in the same winter the defendants cut upon the lake shore roads, or roads round lakes, 2197 trees. 6th. Of the value of \$1867.45. 7th. Of which two-thirds were cut in the winter of 1868 and 1869. 8th. Being of the value of \$1244.97; and the jury further found that *before* cutting the timber trees which were cut in the winter of 1867 and 1868, *the defendants had notice* of the by-law of July, 1867.

Upon this finding a verdict was entered for the plaintiffs on all the issues, and \$2297.20 damages, and leave was reserved to the defendants to move to set aside this verdict upon the issue traversing the plaintiffs property *only*, and to enter a verdict for the defendants upon that issue, or to reduce the verdict to the amount found by the jury to be the value of the timber cut in 1868 and 1869, or to such amount as found by the jury as the Court should be of opinion the verdict upon the issue of not plaintiffs' property should be entered for, in view of certain objections taken

by defendants to the plaintiffs' right to recover; the plaintiffs to be at liberty to object to the sufficiency of the evidence of defendants' licenses, if they could shew it to be insufficient, the Court to be at liberty to draw such inferences as a jury should, and to mould the verdict upon the above issue, if not plaintiffs' property, as the Court should think fit upon the evidence, in view of the objections, having regard to the finding of the jury as to quantities, value and period of cutting; *the verdict in any case to stand for the plaintiffs on the other issues.*

In Michaelmas Term, 1869, *R. A. Harrison*, Q. C., on behalf of the defendants, obtained a rule *nisi* accordingly, to which *Anderson* (with him *Frank Draper*), in Hilary Term last, shewed cause, citing *The Corporation of Burleigh v. Hales*, 27 U. C. R. 72; *Broom's Legal Maxims*, 73, 76; 29 & 30 Vic. ch. 51, sec. 333, sub-sec. 5.

Harrison, contra, cited *Farquharson v. Knight*, 25 U. C. R. 413; *McMillan v. McDonell*, 27 U. C. R. 36; *White v. Dunlop*, *Ib.* 237; *Corporation of Burleigh v. Campbell*, 18 C. P. 457; *Regina v. Great Western R. W. Co.*, 21 U. C. R. 555; *Ovens v. Davidson*, 10 C. P. 302; *Carrick v. Johnson*, 26 U. C. R. 69.

HAGARTY, C. J.—By ch. 23, Consol. Canada, sec. 1, the Commissioner of Crown Lands, &c., may grant licenses to cut timber on the ungranted lands of the Crown. By sec. 2 the licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being on the nominee the right to take and keep exclusive possession of the land so described, &c., and shall vest in the nominee all rights of property whatsoever in all trees, &c., cut within the limits of the license.

The licenses granted from time to time to the defendants in this case describe the limits as commencing at a given point and extending a continuous number of miles.

I understand that the township of Barrie had been surveyed and had its own municipal corporation prior to the granting of licenses to defendants.

The licenses give the right to cut timber upon the location described on the back thereof, and to hold to the exclusion of all others, except as after mentioned; that nothing therein should prevent any persons from taking standing timber of any kind to be used for making roads or bridges, or for any public work; and that persons settling under lawful authority within the location, should not be interrupted in clearing and cultivation by the licentiate.

It was held in *Corporation of Burleigh v. Hales*, 27 U. C. 72, that township councils could recover from wrong doers the value of timber cut on road allowances, and also that they have the statutable right to pass by-laws to preserve or sell such timber.

Corporation of Burleigh v. Campbell, 18 C. P. 457, decided that no actions can be maintained against the party who cuts timber under license from the Crown, when it is not shewn that the municipality have in any way exercised the powers they have of making a by-law on this subject.

Here there was a by-law passed for the preservation of the timber on the road allowances, and, on the authority of the two cases cited, I think we should hold that, at all events since the passing of the by-law, the plaintiffs are entitled to recover.

The question was not raised whether the licenses actually gave the right to cut timber on the road allowances; nor was it apparently considered by the Court of Common Pleas as a point expressly before them for judgment. The case assumes that such power is given.

Were it necessary expressly to decide that point, I would have great difficulty in holding that any such right was given.

Under a statute authorizing licensees to cut timber on the ungranted lands of the Crown, and to give exclusive possession of the lands described in the license, it is difficult to believe that the public highways, formally marked out and reserved as such in the original survey prior to the

licenses, can possibly be included. Such allowances are declared to be "common and public highways," and, I think, it cannot be intended against the Crown that either a grant or license of a tract of country, measuring, say, five miles square, between certain named points, would pass a right to roads intersecting such tract, previously reserved as public highways.

The "exclusive possession" given to the licensee, on the one hand, and the exceptions in favour of settlers clearing and cultivating within the location, on the other hand, seem strongly to oppose such a construction.

In any event it seems to me that the license must be read as controlled by the existing statute law authorizing the municipality to make by-laws for the preservation of the timber on road allowances, and when such power is clearly exercised by the municipality, the license must cease to protect (if it ever in fact did protect) the licensee in cutting the timber.

GWYNNE, J.—There cannot, I think, be any doubt that not only the side lines and concession roads, but also the roads round lakes upon which the timber was cut, for which this action was brought, have been all sufficiently laid down and established as road allowances, so that the plaintiffs' right, if any, to recover will effect the timber cut on the roads round lakes, as well as that cut upon the side lines and concession roads. The instructions to the surveyor to lay down the roads round lakes were precise, and he swore that he did do so, not only on his map, but also on the ground, in such a manner as that they could be plainly traced. There was abundant evidence to shew that there was no difficulty whatever in tracing the roads upon the ground.

By sec. 315 of 29 & 30 Vic. ch. 51, the Municipal Institutions Act of 1866, it is enacted that "all allowances made for roads by the Crown Surveyors in any township already laid out, and hereafter laid out, shall be deemed common and public highways." By sec. 317, it is enacted that,

“subject to the exceptions and provisions thereafter contained, every municipal council shall have jurisdiction over the original allowances for roads, highways, and bridges within the municipality.

By sec. 333, sub-sec. 5, it is enacted that, “the council of every township, &c., may pass by-laws for preserving or selling timber, trees, stone, sand or gravel, on any allowance or appropriations for a public road.”

Under the corresponding clauses in Consolidated Statutes of Upper Canada, ch. 54, it was decided, in *The Corporation of Burleigh v. Hales et al.*, that a township corporation, without having passed any by-law on the subject, could maintain trespass against a wrong-doer for cutting and carrying away trees growing upon government allowances for road; and in *The Corporation of Burleigh v. Campbell* (18 C. P. 457) it was decided by this Court that a township corporation could not *without a by-law* maintain an action against a person who cuts timber on these road allowances under the authority of a license of the Crown. The Court adopted the decision in *Burleigh v. Hales*, but held that a person having a timber license was not a wrong-doer within the meaning of that decision, so as to make him liable as such to a corporation which had passed no by-law for preserving the timber.

Notwithstanding that the Act declares that unless otherwise provided for, the soil and freehold of every highway laid out according to law shall be vested in His Majesty, still, inasmuch as the Act, in express terms, gives to every municipal council jurisdiction over the original allowances for roads within the municipality, and empowers the council to pass by-laws for preserving as well as for selling the timber and trees thereon, we must, I think, hold that after the passing of a by-law for preservation of the timber, a person who cuts the timber, as the defendants have done here, in violation of the by-law, can not exempt himself from liability by producing a timber license issued under ch. 23 of the Consolidated Statutes of Canada. It has been contended that the license is a

sufficient protection to the defendants, upon the ground that, as is contended, the Municipal Act which confers power upon the municipalities over the road allowances does not name the Crown, and that therefore the Crown is not bound, and that a Crown license, which, it is said, these timber licenses are, must prevail over the by-law of the municipalities. But the power which is conferred by the legislature upon the municipalities is a power specially affecting the road allowances, the soil and freehold of which is in the Crown, and so the estate of the Crown is what is directly affected by the Act, and therefore, the Crown, in my judgment, is bound. In fact, the soil and freehold of these road allowances is vested in the Crown, subject to the rights of the public therein, and subject to the rights of the municipalities to pass by-laws for the preservation or sale of the timber growing thereon. It appears to me, therefore, that whatever right the defendants may have had under the licenses produced, to cut timber growing upon the road allowances in question if there had been no by-law, that right ceased upon the by-law having passed, and the acts of the defendants, subsequently to their having notice of that by-law, cannot be justified under a license then in existence, although issued previously to the passing of the by-law. In *The Corporation of Burleigh v. Campbell* (18 C. P. 457) it was not contended, neither was it in this case before us, that the licenses produced did not give any authority to the licensees to cut the timber growing upon road allowances. It was assumed that they did, because the soil and freehold of the road allowances are vested in the Crown, and because they were not excepted in the licenses; but, I confess, it appears to me doubtful that these licenses confer any authority whatever to cut timber growing on road allowances, although there is no exception of them in the licenses. These licenses had no effect whatever except such as is given to them by the Stat. ch. 23 of C. S. U. C. They do not operate as grants from the Crown, in right of the Crown being seised of the soil and freehold: they

are issued by an officer named in the statute, and have no operation whatever except such as is conferred by the statute. Now the statute provides that the Commissioner of Crown Lands, or any officer or agent under him authorised, may grant licenses to cut timber on the *ungranted lands* of the Crown; and the statute further enacts that these licenses *shall confer*, for the time being, on the nominee, the right to take and keep exclusive possession of the lands so described.

Now, can lands which the Municipal Institutions Act declares *shall be deemed common and public highways*, be lands which come under the designation of "The ungranted lands of the Crown," in ch. 23 of C. S. U. C., although the soil and freehold be in the Crown? It appears to me that the lands, over which the Commissioner of Crown Lands is given power to grant licenses, are those ungranted lands which it is competent and legal for the Crown to grant, and not lands which are devoted to a special public purpose which excludes the possibility of their ever being granted by the Crown. So, in like manner, it cannot be that a licensee of a timber license, granted under the statute, can take and keep exclusive possession of *the common and public highways*. As, however, the Act declares that the license shall confer on the licensee such right over *all* the lands comprised in the license, it would seem to follow that *common and public highways* cannot be comprised in the license. In this view it would be unnecessary to except them in the license. Neither does there seem to me to be anything unreasonable in holding, where a license describes a large territory, comprising within the description of its limits divers *common and public highways*, that all that the license operates upon is the ungranted Crown lands comprised within the description; that is, those lands capable of being, but not yet, granted; and so excluding from the operation of the license *all common and public highways*. The effect of our judgment in this case is that, as all the acts complained of were committed by the defendants after

they had express notice of the by-law, and in defiance thereof, the verdict for the plaintiffs will stand for the whole amount.

GALT, J., concurred.

Rule discharged.

MORELL V. WILMOTT.

Notice of trial—C. S. U. C. ch. 22, sec. 201—Computation of time—Practice.

In computing the eight days notice of trial, or assessment, under sec. 201, C. S. U. C., ch. 22, the commission day of the assizes is to be *included*.

Cuthbert v. Street, 6 U. C. L. J. 20, per McLean, J., in Chambers, overruled.

Stephens obtained a rule *nisi* to set aside the notice of trial in this cause, the verdict, and all subsequent proceedings, for irregularity in the service of the notice of trial, the same having been served too late, viz., on Monday for the following Monday.

Read, Q.C., shewed cause. The question is, whether a notice of trial, served on Monday for the following Monday, is sufficient, and it is submitted that it is under the Common Law Procedure Act, as Consolidated by ch. 22, Consol. Stat. U. C., sec. 201. It is true that the cases of *Vrooman v. Shuert*, 2 Pr. Rep. 122; *Buffalo and Lake Huron Railway Co. v. Brooksbank*, *Ib.* 26; *Callaghan v. Baines*, *Ib.* 144, and *Cuthbert v. Street*, 6 U. C. L. J. 20, are all opposed to this contention; but the first three cases were decided under the C. L. P. Act of 1856, sec. 146, which was different in its wording from the Consolidated Act, and the last, though decided since the latter Act, is, it is submitted, with the greatest deference to the learned Judge who determined it, erroneous, and being merely a Chambers decision is not binding upon this Court. The intention of the Consolidators of the Act in question was to restore the practice which prevailed under the 2 Geo.

IV., ch. 1; and if the Court come to this conclusion, the defendant's rule should be discharged.

Stephens, contra. Cuthbert v. Street was decided not only after consideration, but, as it appears, after consultation with the other Judges, and the practice has since been treated as settled by that case; and it is submitted that that decision is right, on the principle that the eight days are to be days of notice, which the commission day of the assizes is not, being the day of trial.

GWYNNE, J., delivered the judgment of the Court.

By the statute 2 Geo. IV., ch. 1, sec. 36, it was provided that "no cause should be tried unless notice of trial in writing should be given *at least* eight days before such intended trial;" and sec. 22 enacted that "the *first and last* days of all periods of time limited by the Act should be inclusive." Under this Act the practice prevailed, as admitted by McLean, J., in *Cuthbert v. Street* (6 U. C. L. J. 20), to compute the day of service of the notice and the commission day of the assizes as both included, so as to make a notice served on Monday for trial on the following Monday sufficient. He, however, declares it to be his opinion that such a practice was not correct, or sanctioned by the statute, and he adds that he was not aware of any judicial decision by which that practice was sustained. I concur in thinking that, applying the 22nd clause to a notice of trial, so as to make a notice on Monday for Monday a good service, is inconsistent with the 36th clause, which apparently intended that a party should have *at least* eight days' notice before the event, namely, the intended trial, should take place.

In *Rex v. Justices of Herefordshire* (3 B. & Al. 581); *Zouch v. Empsey* (4 B. & Al. 522); *The Queen v. Justices of Shropshire* (8 Ad. & El. 173), and *Mitchell v. Foster* (12 Ad. & El. 472), it was decided that where an act was required to be done so many days *at least* before a given event, time must be reckoned excluding both the day of the act and that of the event. The practice, however,

which prevailed *was* sanctioned by judicial decision, for in *Williams v. Lee* (2 C. P. 157) it was held by this Court that short notice of trial, served on Friday for the following Monday, was a good notice; and the judgment of Robinson, C. J., in *Callaghan v. Baines* (2 Pr. Rep. 144), and in *Cameron v. Cameron* (2 Pr. Rep. 259), and of Burns, J., in *Clark v. Waddell* (2 Pr. Rep. 145), seem to shew very plainly that in the judgment of the Court the practice which prevailed was that which was sanctioned by the statute.

The Common Law Procedure Act, 1856, enacted that "eight days' notice of trial or of assessment shall be given and shall be sufficient in all cases, whether at Bar or at Nisi Prius." Under this Act it was decided in *Vrooman v. Shuert* (2 Pr. Rep. 122); *Buffalo and Lake Huron Railway Co. v. Brooksbanks* (*Ib.*, 126); *Callaghan v. Baines* (*Ib.*, 144); *Clark v. Waddell* (*Ib.*, 145); *Phillips v. Merritt* (*Ib.*, 233); *Cameron v. Cameron* (*Ib.*, 259), that in notices of trial and assessment the first and last days shall not both be reckoned inclusive. The reason given for all these decisions was that, inasmuch as 2 Geo. IV., ch. 1, sec. 22, was confined in its operation to all periods of time limited by that Act, and to such periods of time as should be limited by rules or orders of the Court for regulating practice, it did not touch a question arising upon the construction of the Common Law Procedure Act, and that therefore it was competent for the Court to put a construction upon the latter Act untrammelled by sec. 22 of 2 Geo. IV., ch. 1. This reason, so given in all these cases, conveys a judicial decision, in each one of these cases, that the practice which had prevailed of giving eight days' notice of trial, including therein the day of giving the notice and the commission day, was sanctioned by the provisions of 2 Geo. IV., ch. 1.

The Consolidators of the statutes would seem to have intended to bring back the practice to what it had been under 2 Geo. IV., for the 201st section of the Consolidated Statutes of Upper Canada, ch. 22, which consolidates sec.

146 of the Act of 1856, enacts that "eight days' notice of trial or of assessment, *the first and last days being inclusive*, shall be given and shall be *sufficient* in all cases, whether at Bar or at Nisi Prius, or at the County Courts;" and the 202nd section, which consolidated the 147th section of the Act of 1856, enacts that, "unless otherwise ordered by the Court or a Judge, or by consent, a countermand of notice of trial or assessment shall be given four days (*the first and last days being inclusive*) before the time mentioned in the notice of trial, unless short notice has been given, and then two days, *both inclusive*, before the time mentioned in the notice." Now, these sections, as was said by Burns, J., in *Clark v. Waddell*, of secs. 146 and 147 of the Act of 1856, repeal by implication the 36th section of 2 Geo. IV., ch. 1, so that since the passing of 22 Vic., ch. 22, we are relieved from the embarrassment which the words, "at least eight days before such intended trial," in the 36th sec. of 2 Geo. IV., may have created in putting a construction upon that Act. It is the introduction of these words into the 36th section which led McLean, J., in *Cuthbert v. Street*, to express the opinion that the prevailing practice under 2 Geo. IV., ch. 1, was not sanctioned by that Act. In construing secs. 201 and 202 of 22 Vic., ch. 22, we must do so, as it seems to me, without reference to the 36th section of 2 Geo. IV., for no section corresponding with that is to be found in 22 Vic., ch. 22. Now, what are the days which in those sections are referred to as "*the first and last days being inclusive*?" Clearly, as it appears to me, the "first" means the day upon which the notice is given, the day of the act done, and the last means the day of the *event* of which notice is given, namely, the day named in the notice for the trial to take place. Unless this be so, I can attach no meaning to the expression "the last day being inclusive." Unless it means the day named for the trial to take place the expression is insensible, for the *last day of notice must always* be *included* in the days of notice without the insertion of such expression. But the 202nd

section seems to put an interpretation upon the expression "*the first and last days being inclusive.*" As to the "first" day, there can be no doubt that *it* refers to the day of the act done or notice given: the question is, what is meant by the *last* day being inclusive? The 202nd section enacts that "a countermand of notice of trial shall be given four days before *the time mentioned in the notice of trial*, the first and last days being inclusive." Now, the time mentioned in the notice of trial is the day of the event, the day of which notice is given for the trial to take place, which in practice is the commission day of the assize. The section, then, will read, that a countermand of notice of trial shall be given four days before the commission day of the assize for which notice is given, the *first* and *last* days being inclusive; that is, the day of the act done, or notice given, and the day of the *event mentioned in the notice of trial*; the object of the Act being to define the number of days which must elapse in the period of which these days are the first and the last. Suppose the expression had been, "a countermand of notice of trial shall be given four days before the time mentioned in the notice of trial, the *first* and *last* days being *exclusive*;" can there be any doubt that there the "*first*" day would mean the day of the act done or notice given, and the "*last*" the day of the event notified? I can see no more reason for holding that a *different day* is meant by the term "*last*" day annexed to the word "*inclusive*," than we should have to hold was meant by the same term annexed to the word "*exclusive*." The latter expression would have provided *eight* or *four clear* days, as the case might be, but that plainly is not what the legislature intended. I cannot read the expression, "*the first and last days being inclusive*," so as to give them any meaning, otherwise than as pointing the one to the day of the act done, or day of service, and the other to the day of the event whereof notice is given, or the day mentioned in the notice, both of which days shall be included in the computation of time; and that these words

were intended to have some meaning is apparent from the marked manner in which they are so often repeated and *added* to the corresponding sections of the C. L. P. Act of 1856, the introduction of these words being the only alteration, but a palpable alteration made in the sections referred to by the Consolidators of the statutes. It appears to me, therefore, that the 22 Vic., ch. 22, secs. 201 and 202, re-introduced that old practice which, rightly or wrongly, had been recognized from 1822 to 1856 as the established practice of the Courts, and as that which, according to the construction of the Courts, the statute 2 Geo. IV., ch. 1, sanctioned, and which had been interfered with only by the C. L. P. Act of 1856.

But since the decision in *Cuthbert v. Street*, in Chambers, another practice, founded upon the decision in that case, has grown up, which has now continued for the space of ten years, and an important question arises, how far we are justified in altering that practice by declaring that in our opinion it is not in conformity with a correct construction of the statute. We should not have any hesitation, I think, in holding that a defendant who has any defence to an action which he abstains from entering into, relying upon the decision in *Cuthbert v. Street*, that the notice served upon him was insufficient, should not be prejudiced by the Court now for the first time holding that the decision in *Cuthbert v. Street* cannot be upheld, but should be let in to make his defence at another trial; but, on the other hand, a plaintiff, where no merits are suggested upon behalf of the defence, and where the defendant insists upon the point as a point of irregularity and of strict right, may well insist that he is entitled to hold his verdict if we shall concur with him in the construction he has put upon the Act, and may justly urge, as he does in this case, that our setting aside his verdict may be equivalent to depriving him of all remedy.

The question appears to be, shall a Chambers decision, not disputed in the particular case, and acted upon in general practice for ten years, but never adopted by the

Court in Term, deprive the plaintiff of his right to demand a construction of the Act by the Court, irrespective of such decision? It is only in this particular case that our decision can have any effect, for the practice in future will have to be governed by our decision in Court; and I have come to the conclusion that, inasmuch as it is not pretended the defendant has any meritorious defence, and that he rests upon strict practice, we cannot refuse to give the plaintiff the benefit of our opinion upon the construction of the Act. The case of *Williams v. Lee* (2 C. P. 157) is an express decision of this Court that the time as computed by the plaintiff was that sanctioned by 2 Geo. IV., ch. 1. This, therefore, is a decision of this Court, when presided over by the late Chief Justice Sir James Macaulay, at variance with the decision in *Cuthbert v. Street*. *Callaghan v. Baines* (2 Pr. Rep. 144) was a decision of the Court of Queen's Bench, wherein Robinson, C. J., delivering the judgment of the Court, clearly indicates, as it appears to me, that the decision in that case is founded on the difference between the provisions of the C. L. P. Act of 1856 and 2 Geo. IV., and conveys that the computation, as contended for here by the plaintiff, is that which 2 Geo. VI. sanctioned. *Clark v. Waddell* is to the like effect, and is the decision of Burns, J., sitting in the Practice Court. *Phillips v. Merritt* is to the like effect, and is the decision of the full Court of Queen's Bench; and *Cameron v. Cameron* is to the like effect, and is the decision of Robinson, C. J., in Chambers. I must say, therefore, that, as it appears to me, the decision in *Cuthbert v. Street* is inconsistent with the express provisions of the statute 22 Vic. ch. 22, the object of which, in my judgment, was to re-introduce the old practice which, whether authorized or not by 2 Geo. IV., ch. 1, had prevailed under that Act; and inconsistent with decisions of the several Courts sitting in banc, putting a construction upon that Act. As a point therefore *strictissimi juris*, I think the plaintiff is entitled to our judgment, but as the defendant acted upon the authority of *Cuthbert v. Street*, if he has any merits, he

should be admitted to defend at another trial, costs to abide the event, upon his giving to the plaintiff sufficient security, to the satisfaction of the Master, for the amount of his verdict, or upon paying the amount of the verdict into Court; otherwise, the plaintiff should retain his verdict and the rule should be discharged, but without costs, as the defendant relied upon the authority of *Cuthbert v. Street*.

PATERSON V. WILCOX.

Seduction—Action by brother in loco parentis—Misdirection.

In an action of seduction (both parents being dead), brought by the brother of the girl seduced, who was living with him at the time of the seduction, under an agreement to remunerate her for her services, the Court refused to set aside a verdict for the plaintiff, on the ground of misdirection in telling the jury that plaintiff was legally entitled to damages for distress of mind, injury to the feelings and reputation, and disgrace brought upon him, as standing *in loco parentis*.

SEDUCTION, of plaintiff's sister and servant.

Pleas—Not guilty, and denial of her being plaintiff's servant.

At the trial, before Wilson, J., it was proved that both the parents had died three or four years before action; that after their death plaintiff proposed to his sister to stay with him, offering to pay her wages, or to allow her to have what she could make from his cows. She accepted the latter arrangement, keeping plaintiff's house and working for him in return, and doing his mending for him. While thus employed, she had connection with defendant, became pregnant, and gave birth to a child, being thus disabled from attending to plaintiff's work.

The learned Judge ruled this was sufficient evidence of service.

Defendant's counsel objected to the direction to the jury that they might give damages for the disgrace brought on

the girl and on himself, as her brother, and the probability of her losing marriage, she being a member of his family, and he being *in loco parentis*.

After being out all night, the jury found for plaintiff \$200.

In Easter Term, *Freeman*, Q.C., obtained a rule for a new trial, for misdirection, in telling the jury, in substance, "that the plaintiff was legally entitled to damages for distress of mind, injury to his feelings and reputation, and the disgrace brought upon him, on the ground that plaintiff stood in the position of a parent to his servant, the girl seduced," and on the ground of excessive damages.

Osler shewed cause, citing *Selwyn*, N. P., 13th ed., 1066; *Edmonson v. Machell*, 2 T. R. 4; *Irwin v. Dearman*, 11 Ea. 23; *Howard v. Crowther*, 8 M. & W. 601; *Fores v. Wilson*, Peake, 55.

Freeman, contra, cited *Addison*, Torts, last ed., 702.

HAGARTY, C. J.—Our Seduction Act is inapplicable, and this case must turn upon the present English law.

Had no such direction been given, or had the learned Judge ruled as Mr. Freeman contends he should have done, I do not think we could interfere with a verdict so moderate in amount as £50. Unless, therefore, we are bound to interfere *ex debito*, we should not do so as a matter of discretion.

There are not many cases on this point, and no very clear rule can be deduced from them. The general rule has been applied to the case of an adopted daughter: *Irwin v. Dearman* (11 Ea. 23). Lord Ellenborough says: "This has always been considered as an action *sui generis*, when a person standing in the relation of a parent, or *in loco parentis*, is permitted to recover damages for an injury of this nature, ultra the mere loss of service."

Howard v. Crowther (8 M. & W. 601) was an action by a brother for seduction of his sister and servant. The bankruptcy was pleaded, and it was urged that the cause of action had passed to the assignee. Lord Abinger says

that a right of action for injury to property passes, but "it is otherwise as to an injury to his personal comfort. Assignees of a bankrupt are not to make a profit of a man's wounded feelings. Causes of action, therefore, which are, as in this case, purely personal, do not pass to the assignees," &c. Alderson, B.: "The service, for the loss of which this action was brought, is of more value to one than to another, and the loss of it, therefore, only a personal injury." Here the Court evidently considered there was something beyond the actual loss of service recoverable by the brother.

Fores v. Wilson (Peake, 55) was an action for assaulting plaintiff's servant and debauching her, *per quod*, &c. She was no relation to plaintiff. Erskine objected that, as she was no relation, the jury could not take the injury she had sustained into consideration. Lord Kenyon said: "This is an action in which damages may be given to recompense the servant for the injury she has received. Undoubtedly there must subsist some relation of master and servant; but this action materially differs from the common action for seducing a hired servant to leave her master's service.

* * * A very slight relation is sufficient." The report of this case is not very satisfactory.

There is a short summary of this case in the last edition of *Selwyn's N. P.*, 1066.

Edmonson v. Machell (2 T. R. 4) is a singular case, not very clear as to its facts. It was for assault, and it is not expressly said that it involved a seduction. The girl assaulted lived with the plaintiff, her aunt, her mother residing elsewhere. The learned Judge held that the aunt stood *in loco parentis*, and he thought the case bore analogy to the action brought by the father for deflowering his daughter. An action brought by the girl herself seems to have been withdrawn. The jury gave £300, and it was suggested that some compromise took place as to the measure of damages. Ashurst, J., in Term, in giving judgment, said that "the Judges of that Court had consulted with the rest of the Judges in this case,

and the result of their opinion was, without giving any opinion upon the question of law, that the rule ought to be discharged. An application for a new trial is an application to the discretion of the Court, who ought to exercise that discretion in such a manner as will best answer the ends of justice. * * * All the Judges are unanimously of opinion that, as complete and substantial justice has been done, there is no reason to grant a new trial." The rule was discharged in Term, the niece's own action not to be proceeded with.

Nothing very clear is to be gathered from this case beyond the disposition not to interfere, if possible, when substantial justice was done.

I do not think that in the present state of the law we ought to hold the Judge wrong in his direction, as stated in the rule. We may assume the plaintiff here to be, as it were, the head of the family, both parents being dead. When the brother assumes that position, we are not prepared to say that, where his sister, living under his roof and presumed protection, and acting as his servant, may be seduced, and he thereby lose some service, the damages must necessarily be confined to the mere pecuniary value of the services so lost. The jury here have found a moderate verdict, after long consideration, and we do not think we ought to interfere.

GWYNNE, J.—The objection of Mr. Freeman was not that the evidence did not warrant the plaintiff being regarded *in loco parentis*, so as to entitle him to any damages other than those sustained by the bare loss of service, but that the plaintiff, being a *brother* of the seduced girl, *cannot* be regarded *in loco parentis*. Unless the latter position can be established, I do not think that we can interfere upon the ground of misdirection, which is the only objection taken. No case has been cited to establish that a brother *may not* be regarded *in loco parentis* to a sister living in his family, and I do not feel disposed to establish, or that I should be justified in broadly

establishing, the proposition that *he cannot*. In *Terry v. Hutchinson* (L. R. 3 Q. B. 602), Blackburn, J., speaking of *Irwin v. Dearman*, says the practice before that case had become inveterate of giving the parent, or *person standing in loco parentis*, damages beyond the mere loss of service, in respect of the loss aggravated by the injury to the person seduced.

GALT, J., concurred.

Rule discharged.

MITCHELL ET AL. V. SMELLIE.

Deed of bargain and sale—Construction—C. S. U. C. ch. 90, sec. 2—Amendment.

In an indenture the granting words were, “grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the parties of the second part, their heirs and assigns, all and singular, &c.: To have and to hold unto the said parties of the second part, their heirs and assigns for ever, to the use and upon the trust following, that is to say, to and for the use of, &c., infant children of, &c., their heirs and assigns for ever.” It appeared in evidence that upon the execution of this deed by the grantor, which was executed in completion of a sale of his equity of redemption to the grantees, in settlement of an overdue mortgage held by them as representing the deceased mortgagee, the grantees discharged this mortgage and then mortgaged the estate back to the grantor to secure the purchase money of his equity: in ejectment, brought by the infant children against the lessee of the grantees, *Held*, that the use was not executed in them (the children), but that notwithstanding the use of the word “grant” in the deed, and C. S. U. C. ch. 90, sec. 2, the old rule, that deeds “shall operate according to the intention of the parties, if by law they may,” must govern, and that intention, to be gathered from the mortgage transaction, which would otherwise be defeated, clearly was that the deed should operate as a bargain and sale, vesting the use in the bargainees, the subsequent use being a trust.

Held, also, that a proposed amendment in plaintiffs’ notice of title, by adding a claim *by the grantees in the above indenture* for an alleged forfeiture of a lease executed by them to defendant, by reason of an alleged breach of covenant as to cutting timber, had been properly refused.

Ejectment for the south-east quarter of lot 30, in 4th concession of Whitby.

Plaintiffs claimed under a deed from W. Baker.

Defendant, besides denying plaintiffs' title, claimed title in himself under an indenture of lease from Elizabeth and John Thompson, trustees of plaintiffs.

At the trial, before Gwynne, J., without a jury, a deed was produced and proved upon behalf of the plaintiffs, endorsed in large printed letters, "Indenture of bargain and sale." The body of the indenture was as follows: "This indenture, made the 21st day of September, 1861, between William Baker of, &c., of the first part, and John Thompson of, &c., and Elizabeth Thompson, wife of said John Thompson, *of the second part*, witnesseth that the said party of the first part, *for and in consideration* of the sum of two thousand dollars, of lawful money, &c., to him in hand paid *by the said parties of the second part*, did give, grant, bargain, sell, alien, release, enfeoff, convey and confirm *unto the said parties of the second part, their heirs and assigns*, all and singular that piece of land, &c., together with, &c.: To have and to hold the same *unto the said parties of the second part, their heirs and assigns for ever*, to the use and upon the trust following, that is to say, to and for the use of Jane Ruth Mitchell, Naomi Ann Mitchell, John Ephraim Mitchell, James Alexander Mitchell, and Rachael Jemima Mitchell, the infant children of James Mitchell, of, &c., deceased, and their heirs and assigns for ever."

The defendant John Thompson was called as a witness for the plaintiffs, infant children of the deceased James Mitchell, and he proved that the deed was executed under the following circumstances:

William Baker was indebted by mortgage to the estate of James Mitchell in the sum of about \$1800. After the death of Mitchell, Thompson married his widow, Elizabeth, who was acting as administratrix or executrix of Mitchell's estate, which, did not appear. After the marriage, and in April, 1860, Baker, being unable to pay the mortgage debt, it was agreed between him and Thompson and his wife that Baker, for the further consideration of \$200, to be paid to him,

should convey the land in question to Thompson and wife, in fee, in discharge of the debt due by Baker to the estate of Mitchell, and that to secure the \$200 difference, Thompson and wife should re-execute a mortgage to Baker. Accordingly, in 1860, a deed was executed to Baker, which was not produced, and a mortgage was executed by Thompson and wife to Baker upon the same land to secure his \$200, and the mortgage whereby her \$1800 had been secured by Baker was given up and discharged, or released. It was not contended that this mortgage was not effectually discharged, and the deed executed by Baker was delivered to Thompson. Upon taking this deed to be registered, Thompson ascertained that the land, purported to be conveyed thereby, was subject to another mortgage for \$600, and he accordingly would not register the deed, but took it back and returned it to Baker, requiring him to get the mortgage for \$600 discharged; but Thompson did not then get back either the old mortgage for the \$1800, or that for \$200, which had been delivered to Baker at the time of the delivery of the deed executed by Baker, for the reason, as Thompson said, that he had not sense enough. Baker, however, procured a discharge of the mortgage for \$600, and executed the deed produced at the trial, dated 21st September, 1861. The mortgage, which had been executed by Thompson and wife to Baker, to secure her \$200, still remained in Baker's hands, or rather in the hands of his assignee, one Alexander Ogston, to whom it had been assigned immediately upon its execution, in April, 1860. Whether the deed, dated 21st September, 1861, was the deed which had been executed in April, 1860, and the date then inadvertently omitted and filled up in September, 1861, when re-delivered, did not appear. However, it appeared that the deed was executed for the purpose of effecting the agreement spoken of by Thompson. In February, 1866, Thompson and wife demised the lands in question to the defendant, by indenture produced and proved, for a term of seven years. It was admitted that the mortgage from Thompson and wife to Baker, to secure

the \$200, bore date the 16th April, 1860, and was registered on the 18th of the same month, on the day of the date of the assignment thereof to Ogston. Counsel for the plaintiffs insisted that the deed of 21st September, 1861, having been executed since the Consolidated Statute of U. C. ch. 90, sec. 2, whereby it was provided that all corporeal tenements should, as regarded the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery, it must be held that under the *habendum* in the deed of September 21, the use was executed in the infant children of James Mitchell, who therefore were entitled to recover the legal estate in this action. The learned Judge held that the legal estate passed to the parties of the second part named in the deed, viz., John and Elizabeth Thompson. Leave was then applied for to amend the plaintiffs' notice of claim, by adding a claim by Thompson and wife for an alleged forfeiture of the lease, by reason of an alleged breach of covenant in the lease as to culling timber. This being objected to, the learned Judge refused to make the amendment, and a verdict was rendered for the defendant, and leave reserved to plaintiffs to move upon both points.

Accordingly, in Easter Term, M. C. Cameron, Q. C., obtained a rule to set aside the verdict and enter it for the plaintiffs, pursuant to leave reserved, or for a new trial, on the law and evidence, and on the ground of refusal to allow the proposed amendment as to making the trustees named in the deed filed parties to the record as plaintiffs.

Hector Cameron shewed cause, citing *Doe Snider v. Masters*, 8 U. C. 63; *Doe v. Passingham*, 6 B. & C. 305; *Doe v. Field*, 2 B. & Ad. 564; *Gamble v. Rees*, 6 U. C. 396; 2 W. Saunders, 11 note, 17; *Lewin on Trusts*, last ed., 174.

M. C. Cameron, Q. C., contra, cited *Leith's Bl.* 254, 295; *Miller v. Green*, 8 Bing. 92.

GWYNNE, J., delivered the judgment of the Court.

It is quite apparent from the evidence that the deed was intended to operate as a deed of bargain and sale, other-

wise the intent to secure the \$200 payable to Baker by mortgage would be frustrated, and Thompson and wife, in paying off that mortgage, would, I apprehend, have an interest to have it assigned to a trustee, on their behalf, to secure it as a charge upon the estate of the infants in the land. The frame of the indenture is precisely that of a bargain and sale, and what we are asked to decide, on behalf of the plaintiffs, is that, by reason of the statute which declares that corporeal tenements shall be deemed to lie in grant as well as in livery, we are compelled to treat this conveyance as a conveyance at common law, because the word "grant" is used, and that the use is executed in the infant children of Mr. Mitchell, deceased, the plaintiffs, and so defeat the plain intent of the parties named in the deed and the lease granted to the defendant. I entertain no doubt that, notwithstanding Con. Stat. U. C. ch. 90, sec. 2, the old rule affecting the construction of deeds remains in as much force as ever, that "they shall operate according to the intention of the parties, if by law they may." This deed must, therefore, in my opinion, be construed to be what it professes to be—a bargain and sale—so as to effectuate the intent of the parties, in which case the use is vested in the bargainees, Thompson and wife, and the subsequent use is a trust, and the verdict for the defendant is therefore right.

As to the second point, I am still of the same opinion which I formed at the trial, that the amendment should not have been made; and I do not think that even upon a summons for leave to set up two modes of title, two titles so contradictory in their nature should be allowed to be set up in the same record. In fact the proposed amendment is not to set up two modes of title in the same persons, but leave to try one action at the suit of two different sets of plaintiffs, in respect of two inconsistent rights, the apparent object being to enable landlords to defeat their own lease, upon the allegation that the title to demise was not in themselves, but in the infants.

Rule discharged.

MCKENNA V. POWELL.

Conviction by Justice—C. S. U. C. ch. 105 and 25 Vic. ch. 22—29 & 30 Vic. ch. 50—Appeal to Quarter Sessions—Excess of jurisdiction.

On appeal to the Quarter Sessions from a Justice's conviction, apparently intended to be under C. S. U. C. ch. 105, as amended by 25 Vic. ch. 25, of having, at a time and place named, unlawfully entered the premises of defendant (describing them) with men and teams, and cut down and destroyed certain trees thereon, and taken therefrom a certain valuable walnut log, without stating the premises were *wholly enclosed*, it appeared in evidence that the premises in question were in fact wholly enclosed, but the Chairman directed the jury that the case, if any, was one arising under C. S. U. C. ch. 93, sec. 25, and he charged them accordingly. The jury found the appellant guilty, but the Chairman, notwithstanding, made an order quashing the conviction, considering that the jury had erred in their verdict, as there was no *averment* or evidence that the damage done amounted to 20 cents, and he refused to amend the conviction under 29 & 30 Vic. ch. 50:

Held, that the conviction was one under C. S. U. C. ch. 105, as amended by 25 Vic. ch. 22, and that it was not competent for the Court of Quarter Sessions to convert the charge into one under C. S. C. ch. 93, sec. 25, but that the Chairman should have submitted the appeal to the jury in accordance with 29 & 30 Vic. ch. 50, notwithstanding the omission of the words *wholly enclosed*, and that having submitted it to them, though with an erroneous charge, their verdict of guilty should not have been rescinded, but have been treated as a determination of the appeal, and the Chairman should have amended the conviction, in accordance with 29 & 30 Vic. ch. 50, by the insertion of the omitted words, and have affirmed and enforced the same. A *mandamus* was therefore ordered to issue, directing the order of the Quarter Sessions to be set aside, as in excess of jurisdiction, and the conviction to be amended and affirmed.

In Michaelmas Term last, *Robinson*, Q.C., obtained a rule calling upon the Chairman of the Quarter Sessions of the County of Lambton and the appellant to shew cause why the order endorsed on the conviction in this case should not be quashed, or why a peremptory writ of *mandamus* should not issue commanding the Court of General Sessions of the Peace to enter all proper continuances, and to set aside and rescind the said order, and to amend the said conviction, by inserting therein an allegation that the injury done was to the amount of of twenty cents, and that the act complained of was done maliciously, and by reducing the fine thereby enforced to

four dollars, and to affirm the said conviction so amended, and to order and adjudge the said conviction to be enforced.

It appeared that, on the 3rd day of April, 1869, one John McKenna was convicted before John Sinclair, Esq., one of Her Majesty's Justices of the Peace in and for the County of Lambton, upon the complaint of Henry Powell, for that the said John McKenna "did, on the 13th March then last past, at Brooke, in the said County, unlawfully enter into the premises of the said Henry Powell, being the west-half of lot number 14 in the first concession of the said Township of Brooke, with men and teams, and did cut and destroy certain trees thereon, and did take therefrom a certain valuable walnut log;" and for this said offence the said John McKenna was adjudged to forfeit and pay the sum of five dollars, to be paid and applied according to law, and also to pay to the said Henry Powell the sum of three dollars and five cents for his costs.

From this conviction McKenna duly appealed to the Court of Quarter Sessions, and upon the appeal coming up, counsel for the appellant took the following objections to the conviction: 1st, That no specific offence was set out; 2nd, That three different offences were set out; 3rd, That the timber was not stated to be of any value; and 4th, That it was not sufficient to state that it was done unlawfully; and he moved the Court to quash the conviction on these grounds.

The Chairman of the Sessions noted the objections, but upon the respondent's counsel citing 29 & 30 Vic., ch. 50, sec. 1, and urging that the case, under the section cited, must be tried and adjudicated upon the merits, the Chairman allowed the case to go on, stating, at the same time, that the objections would be disposed of afterwards. A jury was thereupon called, and the appeal was tried upon the merits. In the course of the evidence it appeared that in fact the premises, whereon the trespass complained of was committed, were wholly enclosed. The Chairman, however, as appeared by his report of the proceedings, charged the jury, in substance, that if there

was any case at all it was under ch. 93, Con. Stat. C., sec. 25, and that in order to convict the appellant they must be satisfied that the act was unlawful and malicious; that there was no evidence given by the respondent of the value of the trees cut; that the respondent could not succeed unless the injury done amounted to twenty cents; yet that they had heard the evidence as to the number of trees cut by the appellant, and that the question of value was a question for the jury to decide.

The jury rendered a verdict of guilty, adding the words "twenty cents." The Chairman of the Quarter Sessions further reported that the verdict of guilty was recorded without any mention of the further finding of the jury as to the amount. The respondent then moved to have the fine reduced in the discretion of the Court, and the appellant renewed his motion that the conviction be quashed. The Chairman of the Quarter Sessions further reported that upon the appellant's motion he gave judgment quashing the conviction, for the reason that, in his judgment, the jury erred in finding a verdict of guilty, as there was no evidence before them that the injury amounted to twenty cents, and that the conviction returned by the Justice was bad for not alleging upon the face of it that the injury done amounted to twenty cents, and he refused to amend the conviction under 29 & 30 Vic. ch. 50, but made the following order, endorsed on the conviction: "Ordered, that the conviction be quashed, and that the appellant be allowed his costs of appeal, amounting to twenty-one dollars and eighty-nine cents, payable on or before the 1st day of August, 1869, to be paid to the Clerk of the Peace."

In Hilary Term last *Harrison*, Q.C., shewed cause, citing *Rex v. The Justices of County of Carnarvon*, 4 B. & Ad. 86; *The Queen v. The Inhabitants of, &c.*, 4 E. & B. 780; *The Queen v. Justices of W. R. of Yorkshire*, 2 Q. B. 705; 13 & 14 Vic. ch. 45, sec. 7 (Imp.)

Robinson, Q. C., contra.

GWYNNE, J., delivered the judgment of the Court.

If the charge of which the appellant was convicted before the magistrate was, as I think it was, a good charge of trespass under Con. Stat. U. C. ch. 105, as amended by 25 Vic. ch. 22, if the conviction contained the averment that the premises were wholly enclosed, I do not think that it would be competent for the Court of Quarter Sessions to convert that into a charge of malicious injury to trees under Con. Stat. C., ch. 93, sec. 25. Treating the conviction as one under Con. Stat. U. C., ch. 105, as amended by 25 Vic. ch. 22, it was the duty of the Chairman of the Quarter Sessions to submit the appeal to the jury in accordance with 29 & 30 Vic. ch. 50, notwithstanding the omission in the conviction to aver that the premises were wholly enclosed. The evidence given established the fact that the premises were so enclosed. The appeal was submitted to a jury, and although the learned Chairman charged that if there was any case at all it was under ch. 93, Con. Stat. C., the finding of the jury, of guilty of the offence whereof the appellant was convicted, cannot be rescinded, but must be treated as a determination of the appeal. Now, 29 & 30 Vic. ch. 50, sec. 1, enacts that, if upon the appeal the party charged or complained against shall be found guilty, the *conviction shall be affirmed*, and the Court *shall* amend the same if necessary, and any conviction so affirmed, or affirmed and amended, *shall be* enforced in the same manner as convictions affirmed in appeal are now enforced.

The only amendment which was necessary was the insertion in the conviction of the averment that the premises were "wholly enclosed." Under these circumstances, as it appears to us, upon the verdict of guilty being rendered by the jury sworn to try the appeal, it was the duty of the Chairman of the Sessions to have amended the conviction by the insertion of the above averment, and to have affirmed and enforced the conviction. We are of opinion, therefore, that the order which has been made quashing the conviction, notwithstanding the verdict of

the jury upon the hearing of the appeal, was in excess of jurisdiction and should be set aside, and that a *mandamus* should go directing that order to be set aside, and directing the amendment of the conviction by the insertion of the averment that the premises where the trespass was committed were wholly enclosed, and the affirmance of the conviction so amended.

Rule accordingly.

IN RE ALEXANDER GIBSON V. THE CORPORATION OF THE
COUNTY OF BRUCE.

*By-law—29-30 Vic. ch. 51, secs. 196, 228—31 Vic. ch. 13 (Ont.)—
Construction.*

Held, that in every case in which it is necessary to submit a by-law to the electors for assent, the requirements of sec. 196 of 29 & 30 Vic. ch. 51, as regards notice, must be followed, and that sec. 228 only applies to those cases in which county councils are authorized to raise money by by-law without submitting the same for the assent of the electors. In this case the publication of the by-law was objected to as insufficient under sub-sec. 2 of sec. 196 of the act, the first publication being on the 8th, and the last on 29th October; but it was subsequently inserted on the 19th and 26th November, and also on the 3rd December, and every effort appeared to have been made to give the by-law publication. The Court, in the exercise of its discretion, refused to quash the by-law on this ground.

Held, also, that the by-law was not *ultra vires*, as the 2nd sec. of the Act under which it was passed, 31 Vic. ch. 13 (Ont.), was wide enough to include county municipalities.

M. C. Cameron, Q.C., obtained a rule calling upon the corporation of the County of Bruce to shew cause why by-law No. 35 of the said corporation, "intituled a by-law to aid the Wellington, Grey and Bruce Railway by a free grant or donation of debentures, by way of bonus, to the extent of \$250,000, upon the terms and subject to the instructions, stipulations and conditions hereafter mentioned, and to be contained in the agreement hereinafter referred to," passed on the 7th December, 1869, should not be quashed, with costs, on the following grounds :

First. Because said by-law was passed within less than three months after the same was first published in any newspaper in the said county.

Second. Because said by-law was passed at an ordinary meeting of the council and not at a meeting especially called for the purpose of considering the same, as required by law.

Third. Because the notice required to be given by section 228 of the act respecting The Municipal Institutions of Upper Canada was not given, nor was any sufficient notice to the effect and purport of such notice given.

Fourth. Because the polls for taking the votes of the electors or qualified rate payers of the several municipalities were not opened in the proper places in the townships of Greenock and Huron.

Fifth. Because the said by-law was only published, as required by law, from the 8th to 29th October, 1869, inclusive, and not weekly for one month next before the same was passed, and was passed on the 7th December, 1869, and no notice was given of the time and place when and where the said by-law would be considered by the council; and because the said by-law was in other respects passed without the formalities required by law; and because said corporation acted *ultra vires* in granting a bonus.

Robinson, Q.C., shewed cause, citing *In re Michie and Corporation of Toronto*, 11 C. P. 386; *Hill v. Municipality of Tecumseth*, 6 C. P. 297; *Sutherland v. Municipal Council of East Nissouri*, 10 U. C. 626; *In re Grant and the City of Toronto*, 12 C. P. 357; *Boulton and the Town Council of Peterborough*, 16 U. C. 380; *Gibb and the Corporation of Township of Moore*, 27 U. C. 150; *Grant and the Corporation of Township of Puslinch, Ib.* 154.

Cameron, contra, referred to *Simpson and the Corporation of Lincoln*, 13 C. P. 48.

GALT, J., delivered the judgment of the Court.

Section 227 of 29-30 Vic. ch. 51, Municipal Institutions

Act, is as follows : " Every by-law (except for drainage, &c.,) for raising upon the credit of the municipality any money not required for its ordinary expenditure, and not payable within the same municipal year, shall, before the final passing thereof, receive the assent of the electors of the municipality in the manner provided for in the 196th section of this Act; except that in counties (other than cities) the council of such county or counties may raise by by-law or by-laws, without submitting the same for the assent of the electors of such county or counties, for contracting debts or loans, any sum or sums over and above the sums required for its ordinary expenditure, not exceeding in any one year \$20,000.

Section 228.—" Provided that no such by-law of a county council for contracting any such debt or loan, for an amount over and above the sums required for its ordinary expenditure, not exceeding in any year \$20,000, shall be valid unless the same is passed at a meeting of the council especially called for the purpose of considering the same, and held not less than three months after a copy of such by-law at length, as the same is ultimately passed, together with a notice of the day appointed for such meeting, has been published in some newspaper issued weekly or oftener within the county, or, if there be no such public newspaper, then in a public newspaper published nearest to the county; which said notice may be to the effect following :"

From the above sections it appears that all by-laws (except for drainage purposes) for raising money, not required for ordinary expenditure, and not payable within the year, shall, before the passing thereof, be submitted for the assent of the electors as provided for in section 196. This provision applies to all municipalities, and then follows an exception in favour of councils other than cities, authorizing the council of such county to raise by by-law, without submitting the same for the assent of the electors, any sum not exceeding \$20,000 in any one year. Section 228 then provides that no *such* by-law of a county council

shall be valid unless the same is passed at a meeting of the council after certain notice has been given.

From the best consideration we have been able to give to the provisions of these sections we have arrived at the conclusion that, in every case in which it is necessary to submit a by-law to the electors for their assent, the provisions, as regards notice, which are required by the 196th section, must be followed, and that section 228 applies only to those cases in which county councils are authorized to raise money by by-law without submitting the same for the assent of the electors. If we entertained any doubt on this being the true construction, from a perusal of the sections themselves, we think that the form of notice given in section 228 would have removed it. That form is as follows :

“ Form of Notice.

“ The above is a true copy of a proposed by-law to be taken into consideration by the municipality of the county of at in the said county on the day of at which time and place the *members of the council* are hereby required to attend for the purpose aforesaid ;” no reference whatever being made to the electors.

This disposes of the first three objections taken to the by-law.

Section 196, sub-secs. 1, 2, 3, which alone are in question in this case are as follows :

Sec. 196. “ In case a by-law requires the assent of the electors of a municipality before the first passing thereof, the following proceedings shall be taken for ascertaining such assent, except in cases otherwise provided for.”

Sub-sec. 1. “ The council shall by the by-law fix the day, hour and place for taking the votes of the electors therein at every place in the municipality at which the elections of the members of the council or councils therein are held, and shall also name a returning officer to take the votes at every such place, and such day shall not be less than three nor more than four weeks after the first publication of the proposed by-law as herein provided for.”

2. "The council shall, for at least one month before the final passing of the proposed by-law, publish a copy thereof in some newspaper published weekly or oftener in the municipality, or if there is no such newspaper, in some newspaper in the nearest place in which a newspaper is published, and also put up a copy of the by-law in four or more of the most public places in the municipality."

3. "Appended to each copy so published and posted shall be a notice signed by the clerk of the council, stating that such copy is a true copy of a proposed by-law which will be taken into consideration by the council after one month from the first publication in the newspaper, stating the day of the first publication, and naming the hour, day and place or places fixed for taking the votes of the electors."

The validity of the by-law now before us is contested on the following grounds, as not having been passed in conformity with the above sub-sections.

[The learned Judge here recapitulated the two remaining grounds of objection, and after disposing of the first against the relator, being a mere matter of fact arising on affidavits, and therefore requiring no further allusion, he proceeded :]

The fifth objection as to the publication of the proposed by-law remains to be considered.

We have already expressed our opinion that the requirements of section 228 have no bearing on this by-law, but that it is governed by those of sub-sections 1, 2, and 3, of section 196.

Sub-section 1 requires that the voting shall not take place in less than three, nor more than four weeks after the first publication of the proposed by-law. This was complied with, the first publication being on the 8th October, and the voting on the 2nd November.

Sub-section 2 requires that the Council shall, for at least one week before the final passing of the proposed by-law, publish a copy thereof in some newspaper published weekly or oftener in the municipality, &c., and also put up a copy of the by-law at four or more of the public places; and by sub-section 3, a notice must be appended to each copy so

published and posted. No stress was laid, on the argument, upon any objection to the form of notice, nor do we think that any could have been successfully urged; nor was any complaint made as to the posting of the notices; but it was strongly contended that the publication in the newspapers was insufficient, the first advertisement having been inserted on the 8th October, and the last on 29th October, when by mistake they were stopped. The notice was, however, subsequently inserted on 19th and 26th November, and also on 3rd December. It appears, also, from the evidence before us that every effort was made to give publicity to the proposed by-law, and in fact, when the vote of the Council was taken, there were twenty-four out of twenty-five members present and the 25th made his appearance in the evening, and no complaint was made by him of want of notice.

It is within the discretion of the court whether they will quash a by-law even for objections appearing on the face of the by-law: see *Grant v. City of Toronto* (11 C. P. 386); but for matters not so appearing the Court will not quash a by-law except there is something very wrong: see *Sutherland v. East Nissouri* (10 U. C. 526.) In *Boulton v. The Town of Peterborough* (16 U. C. 380) the Court of Queen's Bench expressly refused to set aside a by-law for want of due publication. We think that we should not be exercising a wise discretion in setting aside so important a by-law as that now before us on so trifling an objection, even if we were of opinion that the publication was insufficient.

The last and most important objection remains to be considered, namely, that the by-law was *ultra vires*. This depends on the construction to be put on the 31 Vic. ch. 13, "an Act to amend the act incorporating the Wellington, Grey and Bruce Railway Company." Mr. Cameron contended, on behalf of the relator, that this Act referred only to councils of township municipalities and not to county municipalities, and based his argument on the preamble of the Act and on the first section. It would certainly appear,

from the reference in the first section to "the Reeve or other chief officer of the municipality," that the operation of that clause was confined to township municipalities, as no mention is made of Wardens. By the 65th sec. of 29-30 Vic. it is enacted that "the head of every county and provisional corporation shall be designated the Warden thereof, and of every city and town the Mayor thereof, and of every township and incorporated village the Reeve thereof." It is a principle of law that a statute, which treats of things or persons of an inferior rank, cannot, by any general words, be extended to those of a superior: *Black. Comp.* 88; 2 *Rep.* 46; and consequently if this had been a question under the first section, making valid by-laws which had been previously passed, there might have been a very serious doubt as to whether county municipalities were included. But the second clause is very wide: "It shall be lawful for any other municipality interested in the said undertaking to pass a by-law or by-laws, &c. There is nothing in this section or in any subsequent section that would lead us to conclude that county municipalities are excluded from the operation of the act, and we are therefore of opinion that this objection also fails.

Rule discharged, with costs.

WEINAUGH, ADMINISTRATOR OF BURG, V. PROVINCIAL INSURANCE COMPANY.

Insurance—Condition as to additional insurance—Want of notice—Identity of property insured—Misdirection.

One of the conditions of a fire policy, in this case, was that the insured should at once give notice in writing to the head office of any additional insurance, *and should have the consent of the directors thereto, if given, endorsed on policy, otherwise policy to be void*; and this condition was declared to be notwithstanding anything contained in another condition as to giving notice with reasonable diligence :

Held, that under this condition the assured ran the risk, in effecting a second insurance, of getting defendants' assent, which he had not done, and that the question of reasonable time or diligence in giving notice and getting such assent, which was urged as a defence, could not arise.

Held, also, that the happening of the fire did not absolve the assured from performance of the condition.

The proposal for subsequent insurance spoke of the existing insurance with defendants, and plaintiff in his proofs of loss swore to the fact, and no evidence was offered in any way meeting this, while the plaintiff, in the second count of his declaration, admitted the property insured to be the same; notwithstanding, the question of identity of property covered by the different policies was submitted to the jury.

Held, that this was wrong, as the question, on the evidence, was not open.

DECLARATION on policy of insurance, dated 31st March, 1868, on a stock of cabinet-ware furniture, &c., in plaintiff's house, in Brantford.

2nd count, on a policy of same date and amount, setting out a condition that, in event of subsequent insurance, notice must with all reasonable diligence be given to defendants, to the end that it might be endorsed on the policy, or otherwise acknowledged in writing, in default whereof such policy should be of no effect; and further, that any thing in the last mentioned condition to the contrary notwithstanding, if any additional insurance were effected on the premises thereby assured, the assured should at once give notice in writing to the head office of such additional insurance, and should have the consent of the directors thereto, if given, endorsed on the policy, or a certificate of such consent given, to be signed by, &c., &c., otherwise policy to be void. *Averment*: That Burg did

effect an additional insurance on said property with the Royal Insurance Company, but between the last mentioned insurance and the happening of the fire a sufficient and reasonable time had not elapsed within which Burgy could, with reasonable diligence, have given notice.

Pleas—1st, *non est factum* to first count. 2nd, setting out the condition as to subsequent or additional insurance, and averring that Burgy had after date of policy effected additional insurance, to \$600, with the Home Insurance Company, and \$500 in the Gore District Mutual Company, and \$500 in the Royal Insurance Company, of none of which notice was given to defendants. 3rd, Traverse of loss. 4th, Risk increased. 5th, To same effect.

To 2nd count.—1st, *Non est factum*. 2nd, Additional insurance by Burgy with the Gore Mutual Company \$600, and \$600 with Home Insurance Company, and no notice given, or endorsement or certificate obtained. 3rd, That reasonable time did elapse, after making the insurance with the Royal, before the fire, for giving notice. 4th and 5th, As to increase of risk.

The case was tried at Brantford, before Morrison, J. One policy was produced and admitted, also that loss to \$914 occurred. The defence rested on the additional insurance.

Mr. Kerr, the agent of the Home Insurance Company, proved that on 4th June, 1869, Burgy effected insurance with his company for \$600. The application was produced, signed by him. It stated that \$1000 were insured on the property in the "Provincial," that he told the agent so also. Mr. Kerr said that, as agent for the Hartford Company, he had a policy with Burgy for \$600, expiring 3rd June, 1869, and on the 4th June Burgy effected this insurance with him for same amount instead of that expired.

One Dickson, agent for the Royal Insurance Company, said he had insured Burgy on the 10th June, 1869, \$500. He gave only an interim receipt, dated 18th June. The fire took place 22nd June. "Furniture

in store" was the property mentioned in the receipt. The application was produced, signed by Burgy. It stated \$1000 as then insured in "Provincial." It specified household furniture, walnut and other timber. Dickson was also agent for defendants, and knew of the previous insurance with them. He said, though receipt dated 18th June, Burgy did not pay the premium till the Monday or Tuesday following. The fire was on Tuesday night, and the Royal refused to pay.

The plaintiff was then called. He was administrator; said he had no knowledge of the state of deceased's property; that a statement made by him before Mr. Wilkes was correct, but he did not know personally, and he had little time to examine, and did not personally know what goods were insured with each company.

Samuel McLean said that he signed the application for Burgy, which was given to Mr. Dickson, and Burgy was not present; that he gave no directions as to other insurances, as Dickson knew them himself. Proofs of loss, sworn to by plaintiff, were put in, setting out the property insured and destroyed, and stating that at the time of the fire other insurances on the said goods and chattels were, in the Royal Insurance Company, \$500; in the Home Insurance, \$600; in the Gore Mutual Company, \$600, on goods. A very full inventory, occupying several pages of the property destroyed, was annexed.

Counsel for the defence objected that the plea of another insurance, without notice and assent, was proved. He desired to add another plea, but the learned Judge held the defence arose as the record then stood; also, that the insurance with the Home Company was an additional insurance within the meaning of the policy, and though the amount not increased, and only one office substituted for another, defendants were entitled to notice. On this latter point leave was reserved to move to enter a non suit. The learned Judge left it to the jury to say whether any of the property mentioned in the Home policy, or in the Royal, was covered by defendants' policy, and whether the

insured had a reasonable time, after effecting insurance with the Royal, to notify defendants, &c. This was objected to, it being urged that the jury should be told to find for defendants generally.

The jury found for plaintiff. They said, in a memorandum handed in by them, that there was no additional insurance upon the property, or any part thereof, and that there was not sufficient time to give notice after the payment of the money to the agent of the Royal before the fire.

In Easter Term *Duggan*, Q.C., obtained a rule for a non-suit on the leave reserved, or for new trial on the law and evidence, and for misdirection, in holding that conditions as to notice, &c., were complied with; and for leaving questions to the jury which should have been decided by the Court; or to arrest the judgment on the second count.

Hardy shewed cause, citing *Osser v. Provincial Insurance Co.*, 12 C. P. 133; *Jacobs v. Equitable Insurance Co.*, 19 U. C. 250, 257; *Ayrey v. Fearnside*, 4 M. & W. 168; *Corner v. Shew* 4 M. & W. 163; *Hayter v. Mowatt*, 2 M. & W. 56; *Mann et al. v. Western Assurance Co.*, 17 U. C. 190.

J. H. Cameron, Q.C., and *Duggan*, Q.C., contra, cited *Rex v. Justices of Huntingdonshire*, 5 D. & R. 588; *Noad v. Provincial Insurance Co.*, 18 U. C. 584.

HAGARTY, C.J., delivered the judgment of the Court.

We are quite clear that, on the decided cases, we must hold that what took place with the Royal Insurance Co. was an actual insurance: see *Bruce v. Gore District Insurance Co.* (20 C. P. 207) and the other cases there referred to. It was stated, in argument, and, as we understand, admitted, that plaintiff has been paid by the Royal.

As to the identity of the property insured, in whole or in part, covered by the policy in this suit, and the insurance with the Royal, we think there was nothing to warrant the submitting of any question on this point to

the jury. The papers speak for themselves. The proposal speaks of the existing insurance of \$1000 with the defendants, and the plaintiff in his proofs of loss swears to the fact. There was no evidence, that we can see, in any way meeting this distinct proof, and nothing to be left thereon to the jury. The plaintiff, in his second count, admits the fact so to be, but it is not necessary even to refer thereto for proof. If a plaintiff had been in a position to prove distinctly that it was a mistake, alleging that the policy of the defendants covered any portion of the property insured in the Royal, we should not be disposed to attach too much weight to the statement in the proposal. We think, therefore, the learned judge should have treated this matter as not open.

Then, as to the omission to give notice to the defendants; even if plaintiff's contention be sound, that a reasonable time had not elapsed before the fire, he is in the difficulty that he never gave the notice or obtained the consent either before or after the fire. He seems to consider that the happening of the fire absolved him from performance of the condition. We do not see how he can support this view of his duty.

There is a clause in the defendants' charter (12 Vic. ch. 167, sec. 31) which has been remarked on in *Wood v. Provincial Insurance Co.* (18 U. C. 584). The clause is to the effect, that if any insurance on any house, &c., shall be and subsist in the company, and in any other office, or firm, and by any other person or persons at the same time, the insurance made by this company shall be deemed and become void, unless such double insurance subsist with the consent of the directors, signified by endorsement on the policy.

The clause in the charter seems wide enough to embrace all other insurances existing at or after the making of this policy.

Here the words of the policy are, "The insured shall at once give notice in writing to the head office of such additional insurance, *and shall have the consent of the directors thereto, if given, endorsed on the policy, &c.*, otherwise the

policy to be void"; and this condition, in the body of the policy, is declared to be notwithstanding anything contained in the sixth condition, which speaks of giving notice with reasonable diligence.

In the case in 18 U. C. the condition, as set out on demurrer, was that the assured should give immediate notice *and cause the same to be* endorsed on said policy, averring notice, but that the company of their own wrong neglected to endorse same on the policy.

Sir J. Robinson says, "The plaintiffs engaged to cause it to be endorsed, or that the policy should be void, and they admit that they have not caused it to be done, and so have failed in their part of the condition."

In the present case it is equally incumbent on the assured to give the notice and to have the consent of the directors, if given, endorsed. Nothing of this has been done, and it seems impossible for plaintiff to escape from the clear language of the contract.

It is difficult to avoid the conclusion that on these words the policy is avoided, unless the assured has given the notice and had the consent endorsed; and this without any reference to any question about reasonable diligence or the time of the loss; that, in short, he always runs the risk, in effecting a second insurance, of getting the defendants' assent under this condition, and that it is no question as to reasonable time or diligence.

In *Bruce v. Gore District Mutual Insurance Co.* (20 C. P. 207) it is said, "It was urged on us that the defendants could not avoid the policy after the loss had occurred. We do not see how this can affect the rights allowed them by the statute and the conditions endorsed on the policy."

But in any event we all think notice must be given, whether before or after the fire, and that plaintiff cannot take the happening of a loss by fire, which might be either partial or total, as absolving him from performance of this condition.

Of course such a construction, in the case of a notice not given till after a loss, must practically, in most cases,

defeat all remedy, as the underwriters would be too certain to avail themselves of their right to avoid their contract when their assent at once involves them in the payment of all or part of the sum insured. But plaintiff's difficulty seems insurmountable.

We think the rule must be made absolute to enter a nonsuit, as we think there was no legal evidence to warrant a verdict.

The case was argued before us as if the leave reserved to enter nonsuit was general, and I have so treated it in the foregoing judgment, but examination of the learned judge's notes would seem to shew that the leave appears to have been reserved only as to whether the insurance with the Home Company could be considered as an additional insurance. We have not considered the case as turning on that point. The argument proceeded as if the leave was general. Had it not been so, there would be a new trial without costs; but, as the case has been so treated, we make the rule absolute generally for a nonsuit.

Rule absolute for nonsuit.

WILSON V. BANK OF MONTREAL.

Property in grain—Verdict against evidence.

Plaintiff having shipped grain from P., consigned to his agent at O., directing the consignee to hold it subject to the order of defendants, the local agent of defendants at P. concurring therein, but no advance being made on account of the grain, nor any bill of lading endorsed to defendants, nor other transfer of title made, the consignee obtained advances at O. on the grain, and it was sold to repay them:

Held, that defendants had not incurred any responsibility to plaintiff.

The jury having found that the consignee was agent of defendants, but that finding being manifestly against evidence, *Held*, that defendants were entitled to the *postea*.

TROVER, with the common counts for goods and money.
Pleas, not guilty and never indebted.

At the trial, before Wilson, J., a count was added, that in consideration of plaintiff delivering to defendants certain barley, as collateral security for advances made and to be made, defendants promised to dispose and account therefor to plaintiff; that through their agent they received, or but for their wilful default and neglect, might and ought to have received, large sums of money therefor; yet, although requested, defendants refused to account or pay.

To this plaintiffs pleaded *non assumpsit*.

The facts were these: The plaintiff, in October, 1868, was dealing in grain, buying and shipping to Oswego. He had paper under discount in defendants' agency at Picton. One J. A. Despard was defendants' agent there, and his brother, W. P. Despard, was a commission merchant or agent at Oswego, and seemed to have been doing business for plaintiff, as his agent. On 5th October plaintiff came to defendants' agency, and, as agent swore, asked him to make a cargo of barley, shipped by him for Oswego on 2nd October, and consigned to W. P. Despard, Oswego, per the schooner "L. Stone," subject to the order of the bank. No advance was then made to him, and none of his paper was due. Plaintiff wrote to W. Despard, at Oswego, that he was "to hold cargo of barley, per schooner 'L. B. Stone,' 3679 bushels, consigned to you from Belleville on my account, subject to the order of the Bank of Montreal here, for value received." At the foot there was this memorandum: "Please attend to the above order. F. A. D., Agent" (signed by defendants' agent). On October 6th, W. P. Despard, at Oswego, wrote to plaintiff that he had an order from the Bank of Montreal that morning to hold the cargo of "L. B. Stone" subject to their order for value; that he would do so and write them, but that cargo was subject to freight, &c., and also to \$2000 to reimburse the writer for money loaned plaintiff the previous Saturday. On the same day he wrote to defendants' agent, acknowledging receipt of plaintiff's order in their favour, but stating that this cargo was subject to \$2000 obtained by him thereon, to reimburse him for loan to plaintiff. This was before he had got plaintiff's

telegraph that he had sold the cargo subject to the order of the bank. He also complained of plaintiff's conduct about some sales of grain. On the 17th October the bank discounted a note for \$1000 for plaintiff, who wrote to them a letter authorizing them to hold as collateral therefor certain grain, then in Oswego, viz., cargo of schooner "Enterprise" and "Belle Case." "The cargo of the 'L. B. Stone' you can also hold against the above named advance. This last cargo was subject to a prior claim of \$3000 and the usual charges of which I notify you now." The agent swore he never got any warehouse receipt for the "Stone" cargo. He said he objected to this cargo being put in this letter of 17th October, as he considered the bank secured by the other two cargoes, and plaintiff's father, endorser of the note. He told plaintiff he would assume no risk about it; had he got the receipt he would have looked on the "Stone" cargo as collateral. He made returns to the bank of grain received, but never returned the "Stone" cargo, as he had no control over it; nor did he or the bank ever receive any money for or on it. On the 17th or 18th November, at plaintiff's request, and to satisfy his father, who was getting uneasy, the agent did include the "Stone" cargo, or a portion of it, in a list of grain held by the bank for him. Plaintiff told him he had just returned from Oswego, and W. Despard was about shipping the grain for New York, and the bills of lading would be over in a day or two, and made subject to the bank's order. In this he included a portion of the "Stone" cargo. On the 23rd October the agent wrote to W. Despard to send the elevator's receipt for any grain he held subject to the bank's orders, to be attached to notes about to be discounted for plaintiff, to whom the grain belonged, and on which the advances would be based. On the 25th October W. Despard wrote to the agent enclosing warehouse receipts for barley per "Enterprise" and "Belle Case;" that warehouse receipt of the "L. B. Stone" (3693 bushels), also plaintiff's, was held in Oswego subject to advances made to plaintiff, and he could not obtain it

until the advances were paid, but he could hold the cargo subject to his (agent's) order; that he (W. Despard) had advanced plaintiff that sum and got warehouse receipt to reimburse himself. On the 16th November W. Despard sent to defendants' agent an order on the Lake Ontario Mutual Bank to remit to defendants' agency the balance of proceeds of barley ex. schooner "L. B. Stone," after deducting \$4306 advanced by them thereon. The agent sent this order back to the bank, saying he had nothing to do with it. Plaintiff never paid off the \$2000 charge or asked the defendants to do so.

Letters from plaintiff to W. Despard, dated 28 October, and 9th November, were put in, on his business generally, and as to the shipment of the grain. In the last letter he asked him to say if all his barley had been shipped, and to send the bank or himself, or both, the amount of the Oswego charges.

It appeared that W. P. Despard got on 28th October a further advance of \$2300 on the "Stone" cargo in Oswego from the same parties who made the first \$2000 advance, both claims afterwards transferred to the Lake O. M. Bank.

The "Stone" cargo was shipped to New York about 10th November.

Plaintiff, in January, 1869, made a demand on defendants' agent for the proceeds of the cargo.

A nonsuit was moved on the following grounds: that it was not shewn that W. Despard was defendant's agent; that the bank could not take security on the "Stone" cargo then in a foreign country; that the bank agent could not bind them in such a matter without special authority; that plaintiff lost control over the grain when he consigned it to W. Despard; that when the order was given to the bank, Despard had warehoused the grain in Oswego and raised money on it, and the grain was out of plaintiff's hands; that no advance was made by the bank when this order was given, and the alleged agreement was *nudum pactum*, void by statute; that there was no conversion or receipt of money, nor account stated, that there was no

grain delivered or property therein which passed to defendants; that defendants could take nothing till plaintiff had repaid the \$2000 advance; that the contract was executory and not under seal.

The special count was then added at plaintiff's request. The learned judge ruled on these objections, reserving leave to plaintiff to move.

On the defence W. P. Despard was called. He proved he had for three years been plaintiff's agent in Oswego, doing nearly all his business, and the two amounts he had raised on the cargo. He told plaintiff, on 14th November, of the second amount. Plaintiff asked him if the defendants knew of this. Witness said no, and he would not tell for a few days, as he hoped to raise money to pay off the \$2300. He and plaintiff agreed to say nothing about it to defendants for a few days. He said he had instructions to ship the grain sometimes from the plaintiff, and sometimes from the bank; that he had authority from the plaintiff to ship the cargoes of "Enterprize," "Belle Case," and also the Stone cargo; that he considered himself the agent of the acting owner of the grain. He instructed the L. O. M. Bank to send money to defendants by the order of 15th November. This he did by plaintiff's directions.

The learned judge considered the case would be finally disposed of by the legal exceptions.

In answer to questions put to them, the jury, after much delay, found that on 5th October plaintiff made an actual transfer of the cargo to the bank as security.

They then said that W. Despard was agent at Oswego both for plaintiff and defendants, but on being *polled* they answered contradictorily, and again retired and returned with the finding that he was defendants' agent alone.

The verdict was entered for defendants, with leave to plaintiff to move to enter it for him for \$1774.

In Easter Term, 1869, *Fitzgerald* (of Picton) obtained a rule on the leave reserved, setting forth the various grounds on which plaintiff sought to recover.

This term *C. S. Patterson* shewed cause, citing *Royal Canadian Bank v. Miller* (29 U. C. 266), and *S. Richards*, Q.C., and *Anderson*, supported the rule.

HAGARTY, C.J., delivered the judgment of the Court.

I have come to the conclusion, from a careful examination of the evidence, that the verdict for defendants is right and should not be disturbed. I think the defendants would have been entitled to a nonsuit at the close of the plaintiff's case.

Apart from the very serious difficulties arising from defendants' position as a corporation, I can see no right to recover had the case been between individuals.

The alleged agreement of October 5th seemed to have been a gratuitous proceeding on F. A. Despard's part, wholly without consideration. No warehouse receipt or bill of lading, or anything to pass the property to him, was given at any time. The person then, and for years before, and for a long time after, acting as plaintiff's agent, is told to hold this cargo for the bank, and writes back that he will do so. The bank never acquired any subsequent document of title, nor did they deal with or dispose of the cargo, or derive any benefit whatever from it. The plaintiff, down to 9th November, if not later, is in communication with the Oswego agent, discussing his general business with him, asking if all his grains had been shipped, and to send to him or to the bank the amount of the Oswego charges. This agent was the consignee in possession of this cargo, when the alleged agreement was made on 5th October. He held the receipts therefor, and was master of its disposition.

I am unable to understand how defendants can possibly be made responsible for his subsequent disposition of it to plaintiff's prejudice, or how they and not the plaintiff can be made to suffer for his default. At no moment had defendants the title to or control over this cargo. They were from first to last at the mercy of the person entrusted with the documents of title.

Had the property passed to them in the regular way, by endorsement of warehouse receipts or bills of lading, &c., and they had parted therewith to this person in Oswego, to plaintiff's prejudice, the case would assume a wholly different complexion.

The plaintiff never placed them in a position to control or dispose of the cargo, and I can conceive nothing more unreasonable and unjust than to hold them responsible.

If necessary to consider the peculiar position of defendants, as a banking corporation, I think it would be most difficult to hold them answerable for such a dealing as that of the 5th October between plaintiff and their agent. It was wholly out of the course of business, quite beside the agent's ordinary powers and duties.

I feel no doubt in discharging plaintiff's rule.

The finding of the jury was, I think, wholly against evidence, and had the verdict been for the plaintiff it could not have been upheld.

Rule discharged.

MCAULAY V. ALLEN.

Chattel mortgage—Absence of re-demise—Seizure before default—Right of action—Measure of damages.

Held, following *Porter v. Flintoft*, 6 C.P. 340, and *Ruttan v. Beamish*, 10 C. P. 90, Gwynne, J., dissenting from the former, but concurring in the latter, holding that an action will not lie, at the suit of the mortgagor of chattels against the mortgagee, for seizure of the chattels before default in payment, where there is no proviso in the mortgage for possession by the mortgagor until default; but that even if an action did lie, the jury should be told that the plaintiff could recover only to the extent of his interest in the goods and for the damage done to such interest, instead of, as in this case, for their full value, as in the case of a wrong-doer.

TROVER and Trespass.

Pleas, not guilty and traverse of property.

The cause was tried at Walkerton before Morrison, J.

The facts were that plaintiff had a carding mill machinery which he valued from \$800 to \$1200. The machinery was seized by defendant on 17th November, 1869, and was sold by him some time afterwards for \$984.

The defendant claimed under a chattel mortgage, made to him by plaintiff, dated 17th November, 1868, by which these goods were sold and assigned to him in the usual way, with a defeazance on payment by plaintiff of \$500 on 17th November, 1869; with warranty to defendant of the goods against plaintiff and all others; and that in case of default in payment, or of plaintiff's attempt to sell or part with the possession of the goods, or remove them without consent, then defendant to enter on any lands, &c., where goods were, break locks, &c., for the purpose of taking possession, and after taking possession to sell, pay himself, &c.; but he was not bound to sell, but in default of payment defendant was at liberty peaceably to have and possess the goods without plaintiff's interruption; and plaintiff put defendant in full possession of the goods by delivering to him all the articles in said chattel mortgage.

On 17th November, 1869, the day on which the money was payable, about one, p.m., defendant went and demanded payment from plaintiff, who refused it, or at all events did not pay, whereupon defendant seized the goods and removed them from plaintiff's premises, and sold them some time afterwards.

The learned judge told the jury to find the amount of damage plaintiff was entitled to, and that under the circumstances defendant was not justified in seizing the goods on 17th November, 1869.

Counsel for defendant objected to the charge, and that the jury should have been told that defendant had a right at any time after the mortgage was made to seize and take the goods, and at all events on 17th November, after refusal by plaintiff to pay.

The jury found for plaintiff \$950.

In Easter Term *S. Richards*, Q.C., obtained a rule for a

new trial on the law and evidence, as plaintiff shewed no legal right as against defendant, who was entitled to the property at the time of the trespass; and for misdirection in ruling that defendant was not justified in seizing; and for excessive damages.

Read, Q.C., shewed cause, contending that though the usual possession clause was not in the mortgage, the Court would, on a construction of the whole instrument, hold that the mortgagor was entitled to possession until default. He cited *Brown v. Bateman*, L. R. 2 C. P. 272; *Albert v. Grosvenor, &c. Co.* L. R. 3 Q. B. 123; *Beaumont* on Bills of Sale, 54, 56; *Pickard v. Low*, 15 Maine 48; *Fenn v. Bittleston*, 7 Ex. 152; *Loeschman v. Machin* 2 Stark. 311.

Leith, amicus curiæ, referred to *Doe Roylance v. Lightfoot*, 8 M. & W. 533, the Chief Justice referred to *Porter v. Flintoff*, 6 C. P. 340; *Ruttan v. Beamish*, 10 C. P. 90.

Richards, contra, cited *Brierly v. Kendall*, 17 Q. B. 937; *Porter v. Flintoff* and *Ruttan v. Beamish*, *supra*.

HAGARTY, C.J.—We have no doubt as to the damages being excessive. Assuming even that plaintiff can maintain either trespass or trover, we think that the jury should be told that he could only recover to the extent of his interest in the goods, and for the damages done to such interest. The recovery here has been apparently for the full value of the goods as against a mere wrong-doer.

Brierly v. Kendall (17 Q. B. 937) is in point. Mortgagor brought trespass against mortgagee, under chattel mortgage, which enabled mortgagee, after twenty-four hours' notice, to require immediate payment, and in default to take possession and sell the goods, with a clause allowing mortgagor to hold possession till default. Defendant gave an insufficient notice, and then seized. Lord Campbell, C. J.: "The value of the goods is not the proper measure of damage. If the action had been against a third party the case would have been different; but here it would be

manifestly unjust to adopt such a test. * * In cases like the present I think the damages have generally been assessed according to the value of plaintiff's interest in the goods." Wightman, J. : "In the case of a demise of chattels for one month, could the tenant, in trover for the conversion of them, lay the damages at the full value of the goods?" Patteson, J. : "If the notice be bad, which is admitted, the plaintiff still has the right of possession, and is entitled to damages proportionate to the interest that he had in the goods."

Chinery v. Viall (5 H. & N. 288) recognizes this last case.

The real damage sustained by this plaintiff was caused by defendant seizing and removing the goods one day too soon. In the last cited case Bramwell, B., says : "A man cannot, by merely changing the form of the action, entitle himself to recover damages greater than the amount to which he is in law entitled according to the true facts of the case and real nature of the transaction."

In *Attack v. Bramwell* (3 B. & S. 520) the landlord, to whom rent was due, illegally got into the demised premises by forcibly breaking into a window, and it was held that the tenant could recover the full value of the goods seized, and that the amount of rent due could not be deducted. The distinction between that and *Chinery v. Viall* is very clearly shewn by Blackburn, J. : "When a party sues in trespass or trover for goods, in which the other side has an interest, the measure of damages is plaintiff's interest in them, after allowing for that of defendant. * * Here defendant, having broken plaintiff's house, was a trespasser at, common law, and had no defence against an action of trespass for taking them. * * In *Chinery v. Vial* the Court held that the defendant, being an unpaid vendor (in possession), who converted the goods, had an interest in them which ought to have been allowed in ascertaining the damages." Crompton, J. : "In trover, when there is a conversion of goods, subject to defendant's lien, it is clear that all that can be recovered is their value minus the lien."

In the case before us the right of property certainly passed to the defendant by the mortgage. At the utmost the plaintiff can only claim a possession until default.

But it remains to determine whether any such right was in plaintiff to maintain a possessory action.

Porter v. Flintoft (6 C. P. 335) is in point. Plaintiff was mortgagee of Buchanan, by bill of sale of goods, with defeazance on payment at a future day ; clauses of warranty by Buchanan, that in default, or other contingencies, plaintiff might enter lands and take possession and sell, &c. There was no covenant on plaintiff's part as to B. holding possession till default. Before default defendant, as sheriff, seized the goods on an execution by a third party against Buchanan, and plaintiff brought trespass. Draper, C. J. : "We are of opinion that though a covenant, that mortgagor shall retain possession until default, amounts to a re-demise, yet that in the absence of any such covenant, though the mortgagor remains in possession, it does not prevent the application of the usual well established rule, that the possession follows the property, whenever the right of possession is in the owner." *White v. Morris* (11 C. B. 1015) strongly supports this judgment.

Ruttan v. Beamish (10 C. P. 90) recognizes *Porter v. Flintoft*. In mortgages of real estate, I would gather that there is a strong inclination to allow no implication, or anything short of an express re-demise, to control the absolute legal right to property and possession acquired by the conveyance. I refer to *Doe Roylance v. Lightfoot* (8 M. & W. 533) ; *Doe Parsley v. Day* (2 Q. B., 47), in which latter case Lord Denman qualifies his then recent judgment in *Wheeler v. Montefiore*.

A recent case in England, *Albert v. The Grosvenor Investment Co.* (L. R. 3 Q. B. 123), throws much doubt on this question. Trespass to land and goods. Pleas, not guilty, leave and license and denial of property. Plaintiff had assigned certain goods in his dwelling-house to defendant by bill of sale, subject to proviso for redemption, on payment of money by weekly instalments : provided if mort-

gagor made default in payment, &c., the whole amount would become due, and it was lawful, but not obligatory on mortgagee, to take possession and hold and sell without further consent, or against consent, of mortgagor. Evidence was given of a waiver of one of the defaults by defendant, and a giving of further time and a re-entry and seizure notwithstanding. Plaintiff had a verdict, apparently on the ground that parol evidence was admitted as to extending the time, and thereby, as it were, contradicting the deed, and on this the chief discussion took place.

Next term, in supporting the verdict, counsel urged that it was a mortgage of goods by indenture executed by both parties, and there was what would have amounted, in the case of realty, to a re-demise.

Cockburn, C. J., says, in the course of his judgment: "This is the case of a mortgage, whereby the mortgagor transfers the property in certain goods to the mortgagee, but subject to mortgagor's right of redemption; and there are certain clauses in the deed the result of which is, that mortgagee cannot seize and sell the goods unless the mortgagor makes default, &c." Lush, J., says: "It is also true that the property in the goods passed by the deed to mortgagee, but though it is not specially said so in the deed, the mortgagor has clearly reserved to him a special property in the goods until he has made default, and he had therefore a right of action for seizing and selling the goods without default."

This language is certainly opposed to the view heretofore entertained in this court. The point does not seem to have been argued, or even touched on, by defendant's counsel.

Before formally deciding that mortgagees under such a mortgage had not both the right to possession, as well as property, from the execution of the mortgage, I think a careful review of all the authorities would be requisite.

There is a review of the law as to the position of mortgagor and mortgagee in the notes to *Keech v. Hall* (1 Sm. L. C. 523, ed. of 1867). The result is thus expressed:—"It may perhaps be concluded, on this review of the

authorities, that, in order to make a re-demise, there must be an *affirmative* covenant that the mortgagor shall hold for a *determinate* time, and that where either of these elements is wanting, there is no re-demise." Again (page 537) : "Upon the whole, it is concluded, 1st, If there be an agreement in mortgage deed that mortgagor shall continue in possession till default on a certain day, he is in the meanwhile termor of the intervening term ; 2nd, If default be made on that day, he becomes tenant at sufferance ; 3rd, When no such agreement, he is tenant at sufferance immediately upon the execution of mortgage, unless the mortgagee, expressly or impliedly, consented to his remaining in possession ; 4th, That such consent renders him tenant at will."

In the case before us, there is first an absolute conveyance of the goods, a defeasance on a certain event, then that mortgagor shall forever warrant and defend the goods unto mortgagee, and at the end, a declaration that mortgagor doth put mortgagee in full possession of said goods and chattels, "by delivering to him all the above mentioned articles in said chattel mortgage in the name of all the said goods and chattels at the sealing and delivery hereof."

The mortgagor alone signs the deed : there is no covenant or execution by mortgagee.

I feel very great difficulty in holding that on this instrument the possession does not follow the property conveyed to mortgagee by the deed, and I cannot feel perfect confidence in the short expressions of opinion by the two eminent Judges, in the late English case, as the point was not pressed on their attention, or any apparent enquiry into the state of the authorities. I think our wisest course is to adhere to the judgments already given in this Court, leaving it to plaintiff, if so advised, to take the case to the Court of Appeal.

There is, of course, ground to argue that there is a distinction between this case and *Porter v. Flintoft*, as that action was not between mortgagor and mortgagee,

but against a third person, a wrong-doer. But the principle, as to when the right both of possession and property passed to mortgagee, is, I think, clearly enunciated.

GWYNNE, J.—I concur that there must be a new trial, upon the ground that the damages have been assessed upon an erroneous principle. When the defendant sold the chattels he had a clear right to do so for default in payment; and if he had no right to *seize* the goods on the day that he did, the plaintiff could only be entitled to damages for the injury sustained by reason of the seizure having been made on the 17th instead of upon the 18th November.

Upon the point whether an action lies at suit of a mortgagor of chattels against the mortgagee for *seizure* of the chattels before default in payment of the money secured by the mortgage, although there is no *express* proviso in the mortgage that until default the mortgagor may remain in possession, if *Porter v. Flintoff* and *Ruttan v. Beamish* are conclusive against such right of action we must follow those cases until reversed by a higher Court; but I confess it seems to me that *Porter v. Flintoff* rests upon the authority of *Watson v. Macguire* (5 C. B. 836), the *point in judgment* being that in the case of a chattel mortgage, although the mortgagor remained in actual possession, trespass lay at the suit of the mortgagee *against a wrong-doer*, the principle in such a case applying that possession follows the property. We decided *McGivern v. McCausland* (19 C. P.) upon the same principle; and in *Ruttan v. Beamish*, the *point in judgment*, I take it, was, that a mortgagor, after day of payment past, cannot maintain an action against the mortgagee in possession of the goods mortgaged, without proving payment of the mortgage debt.

The right of a mortgagor to remain in possession of chattels mortgaged until default, may arise, in my opinion, as well by implication as by express proviso: the intention of the parties is to govern, and that is to be gathered from the whole deed; and I cannot but think that we are at

liberty to look at the nature of the property mortgaged to assist us, if that will assist us, in arriving at that intention ; as, for example, where the property mortgaged consists of *material* for making carriages, with a proviso that upon default the mortgagee may enter and take possession of all material then on hand, and all carriages which shall in the meantime be built by the mortgagor of the material mortgaged, surely an implication would there arise that the mortgagor should remain in possession to enable him to build ; and so, in the case before us, where it is machinery in a mill which is mortgaged, can it be supposed that it was intended that the mortgagee might enter the day after the mortgage was executed and take it out and separate it from the mill, and so render the mill useless ?

Until default committed, how can the mortgagee justify entering upon the premises where the machinery was, and if he could not enter upon the premises, where the machinery was, until default, how could he take the machinery itself into his exclusive possession before default ?

If the point be open, I should think, upon the authority of *Wheeler v. Montefiore* (2 Q. B. 133) and *Albert v. Grosvenor Investment Company* (L. R. 2 Q. B. 123), and upon principle, that in this case the mortgagor retained a right, by implication, to remain in possession of the machinery in the mill until default. The warranty of title does not, I think, abridge that right, for the warranty, of course, is limited "according to the tenor and effect of the deed," and the question is as to what that tenor and effect is. The plaintiff, therefore, according to my judgment, would be entitled to nominal damages for a premature seizure ; but, my learned brothers are of opinion that the point is concluded against the plaintiff by the cases I have referred to.

GALT, J., concurred with the Chief Justice.

Rule absolute for new trial, without costs.

McINTOSH V. BRILL.

Conditional contract for purchase of goods.

Plaintiff telegraphed to defendant, in answer to an enquiry about price and quantity of butter on hand, that he had 100 kegs at 20 cents, and defendant replied he would take it, *if good*. Plaintiff did not state, in return, that it was good, or offer to guarantee that it was, but two days after he again telegraphed to come and ship the butter or send \$1500, to which defendant answered that he would try and see him the following week. After the lapse of several days plaintiff enquired whether defendant intended taking the butter or not. In an action by plaintiff against defendant, *Held* that there was no binding contract between the parties, and a nonsuit was therefore directed.

Declaration, on refusal to accept and pay for 100 kegs of butter, bought by defendant and sold by plaintiff, and on the common counts.

Plea, non assumpsit.

Trial at Brantford, before Morrison, J.

Plaintiff dealt in butter at Brantford, and defendant lived at Guelph.

The following telegrams passed between the parties :

“To P. McIntosh. “October 26th, 1869.

“Name the lowest for your butter, and quantity.—Answer.

J. T. BRILL.

“To J. Brill.

“October 27th.

“100 kegs: 20 cents.

“P. McINTOSH.”

“To P. McIntosh.

“October 27th.

“Will take your butter, if good, at 20 cents.

“J. T. BRILL.”

“To J. T. Brill.

“October 29th.

“Come and ship butter or send \$1500.—Answer.

“P. McINTOSH.”

“October 29th.

“Will try and be down to see you next week.

“J. T. BRILL.”

“To J. T. Brill.

“November 5th.

“Will ship butter to-day, and draw on you for amount.

“P. McINTOSH.”

“November 5th.

“Don’t ship it: if you do, I shall not accept.

“J. T. BRILL.”

"To J. P. Brill.

"November 5th.

"Do you intend taking the butter or not?—Answer.

"P. McINTOSH."

"To P. McIntosh.

"November 5th.

"You had better sell your butter.

"J. T. BRILL."

Nothing else passed between the parties. Plaintiff swore he kept the butter on hand for defendant from 27th October to 9th November; that in the mean time he had refused other offers, and that butter had fallen in price. He also proved that it was good butter.

A nonsuit was moved on the ground that no contract was proved. The learned judge thought otherwise, but reserved leave to move, and plaintiff had a verdict.

In Easter Term *Anderson* obtained a rule on the leave reserved, or for a new trial on the law and evidence.

Hardy shewed cause, citing *Thorne v. Barwick*, 16 C. P. 369; *Addison* on Contracts, last ed., 17, 62, 63.

Palmer, contra, cited *Benjamin* on Sales, 29; *Chitty* on Contracts, 10.

HAGARTY, C. J., delivered the judgment of the Court.

The whole question before us is whether these telegrams shew a binding contract.

The plaintiff's difficulty arises from what defendant asserts is the introduction of a new term as to the quality of the butter, and that, as nothing further passed on that subject, there was no common assent to a bargain.

Chitty on Contracts, page 9, quoting Pothier, says: "I cannot, by the mere act of my own mind, transfer to another a right in my goods, without a concurrent intention on his part to accept them; neither can I by my promise confer a right against my person, until the person, to whom the promise is made, has, by his *acceptance* of it, concurred in the intention of acquiring such right."

Chitty, page 10: "On the principle that mutual assent is necessary in order to their being a binding contract, it is held that where an agreement is sought to be established

by letters, such letters will not constitute an agreement, unless the answer be a simple acceptance of the proposal without the introduction of any new term." See also *Sugden V. & P.* 14th ed. 132.

It seems well put in *Benjamin* on Sales, 29 : "A mere proposal by one man obviously constitutes no bargain of itself: it must be accepted by another, and this acceptance must be unconditional. If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, and a new proposal equally ineffectual to complete the contract until assented to by the first proposer." *Hutcheson v. Booker* (5 M. & W. 535); *Jordan v. Norton* (4 M. & W. 155); *Duke v. Andrews* (2 Ex. 290); *Chaplin v. Clarke* (4 Ex. 403); are cases illustrating the general principle.

Here the plaintiff says he has 100 kegs of butter, and his price is 20 cents. Defendant replies, "I will take your butter, *if good*, at 20 cents."

Now here the defendant certainly does not consent to take any butter, but introduces the new term, that it must be good.

Plaintiff might have answered stating its goodness, or offering a guarantee, and then, if defendant accepted, the contract was closed; but this was not done. Two days after plaintiff writes, "Come and ship butter, or send \$1500," to which defendant promptly replies that he would try and see plaintiff the ensuing week.

I cannot see how up to this stage anything can be said to be concluded. Defendant certainly seems not to have considered himself bound, having received no answer as to quality; and several days after plaintiff writes, "Do you intend taking the butter or not? Answer."

I think all remained open between them. Plaintiff argues that the contract was complete, on his shewing his butter was good. I have no doubt that defendant, receiving no answer for two days to his conditional offer, might have considered the negotiation at an end, and supplied

himself elsewhere. I also think that plaintiff, after receiving defendant's offer to take the butter, if good, might at once have sold it to any other person, and if defendant had claimed it he could have answered him conclusively, "as soon as you introduced the words as to its being good, I did not agree thereto, or did not choose to warrant its being so."

If plaintiff be right, then his right of action vested as soon as he received the telegram that defendant would buy, if good, and his own right to dispose of it elsewhere then ceased. I see insuperable objections to acceding to this view; and although I have met with no case directly in point in its facts, nor was any such cited, I think, on general principles, there is no binding contract shewn, and the rule must be absolute to enter a nonsuit.

Rule absolute to enter nonsuit.

HICKEY V. CORPORATION OF COUNTY OF RENFREW.

Corporation officers—Liability to dismissal—Right of action.

Held, that the new county council of a municipality may, before recognition on their part, dismiss the officers appointed by the preceding council, and that such officers have no right of action against the municipality for their year's salary.

THIS was an action for dismissing the plaintiff from his office as Clerk of the Corporation of the County of Renfrew, the first count of the declaration alleging that in consideration that plaintiff would enter defendants' service and serve them for one year, from 7th October, 1868, as their clerk, at the wages of \$400 per annum, defendants promised plaintiff to retain him during said year; that plaintiff entered defendants' service and so continued for part of said year, and was always ready and willing to

continue in said service during the remainder of said year, yet defendants, before the expiration of said year, dismissed plaintiff, whereby, &c., &c. The 2nd count was the same in effect, setting out the passage of a by-law appointing plaintiff. The 3rd count was for work and labour, &c.

Pleas, (to 1st count): Did not promise, and plaintiff misconducted himself, and was incompetent. To 2nd count: Not guilty, and misconduct and incompetency; and to 3rd count: Never indebted.

The case went down to trial at the last Spring Assizes, at Kingston, before Galt, J., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following admissions agreed upon between the parties; the Court to be at liberty to draw inferences of fact as a jury; the question for the opinion of the Court being, whether, under the facts admitted and under the pleadings, plaintiff was entitled to a verdict:

By a by-law passed in June, 1861, plaintiff was appointed clerk of the then provisional council at a salary of \$160. By a subsequent by-law of 11th October, 1866, he was appointed clerk at \$160 salary. A by-law of 24th January, 1867, repealed the preceding and appointed him clerk at \$300 salary per annum; and this was in turn repealed by by-law of 7th October, 1868, which appointed him clerk at \$400 salary per annum, commencing from the passing of the by-law, and was also succeeded, on 27th January, 1869, by another repealing all previous inconsistent by-laws, and appointing one Mitchell clerk of the municipal council at a salary of \$200 per annum.

Plaintiff had performed the duties of clerk from the beginning under these various by-laws. It was admitted that the effect of the last by-law was to dismiss him, and that defendants had done so in the exercise of their alleged right, and not for any cause of complaint against plaintiff.

C. S. Patterson, for the defendants, contended that, as a municipal corporation, defendants were legally entitled, at their option, to dismiss plaintiff, or remove him from the

office of clerk by the passage of the by-law which had superseded him by the appointment of Mitchell; and further that plaintiff had never been hired by them for a year certain; and that the evidence was insufficient to establish his cause of action. He cited *Corporation of Beverley v. Barlow*, 10 C. P. 178; *In re McPherson and Beeman*, 17 U. C. 99; *Emmens v. Elderton*, 13 C. B. 495; *Elderton v. Emmens*, 6 C. B. 160, S. C. 4 C. B. 479; Municipal Act of 1866, secs. 133, 152, 177, 205.

S. Richards, Q.C., contra, cited *Broughton v. Corporation of Brantford*, 19 C. P. 434; Municipal Act of 1866, sec. 246, sub-sec. 3, secs. 157, 177.

HAGARTY, C. J., delivered the judgment of the Court.

In *Broughton v. Corporation of Brantford* this court decided that corporation officers, under section 177 of the Act of 1866, retain office until removed by the council; that an officer in the position of the plaintiff would be entitled, as between individuals, to be considered as holding an annual appointment, with the usual rights as to notice, &c. There the appointment was from 1st January. The Court said, "It was, we think, certainly valid for one year, even if the council of a succeeding year might refuse to confirm it, and decide on removing the plaintiff."

There the plaintiff performed the duties of his office during the first year of his appointment, and for the first nine months of the ensuing year, when he was dismissed in the end of September. We considered that he held office up to the date of his dismissal under and on the terms of his original appointment, and it was held that he was entitled to his salary up to the end of the year, as in the case of an individual hired for that period, and as he had been allowed at *Nisi Prius* by Richards, C.J., who tried the case without a jury.

The point remains, whether, the succeeding council, before any recognition of the plaintiff as their officer, at once, on commencing their business as a new council in January, can dismiss him without having to pay him

up to the end of the year from the time of his appointment. Were this the case of individuals, or of any ordinary trading corporation, plaintiff's right would be clear. It is, however, open to most serious question whether the municipal law will sustain his claim.

It appears that this county council met for the first time on January 26th, 1869, and the following day dismissed the plaintiff.

Section 135 of the Act of 1866 directs that at their first meeting the county council shall organize themselves and elect their warden. Section 13 directs that the clerk shall preside, and if there be no clerk, the members present shall appoint one of themselves to preside.

Section 152 says, "every council shall appoint a clerk."

Then section 177 : "All officers appointed by a council shall hold office until removed by the council."

The inhabitants of the county are constituted a body corporate, and the powers of every body corporate shall be exercised by the council thereof (see secs. 1 and 6), and the council consists of members annually elected in each January.

We think the power of removal of officers clearly belongs to the council. They accept or reject the officers appointed by the preceding council.

When a council appoints an officer like a clerk, he enters upon his duties with the fullest knowledge of his dependence on the pleasure either of the present or any future council.

In the case before us the existing council did not affect to appoint the plaintiff for any specific time. We have to decide whether the exercise by the succeeding council of their undoubted right to remove him at once compels that council to pay him his salary to the end of a year from the date of his appointment; or, in other words, can a council at any period of the year appoint a clerk, or other officer, at an annual salary, which must thus in substance become a charge on the county funds, if the new council do not adopt him as their officer?

If such a power exists, it is open to the most serious abuse. A retiring council might thus in the last few weeks of their year of office re-appoint at increased salaries all their officials, and their year's salaries, say, from some day in December, would be recoverable by suit from the municipality, if the new council resist the appointment.

I cannot believe that such is the law governing our municipalities. Their powers are defined with reasonable clearness, and great precautions are taken to protect the public funds from misapplication. Conceding the right of each council to choose its own officers, the adoption of the plaintiff's view of the law must most seriously interfere with the practical exercise of such right.

I have arrived at the conclusion that, on the true construction of our municipal law, the plaintiff's case fails.

I think each council can appoint, but always subject to have its appointment rejected by its successors, and that each person accepting office adopts that contingency as part of his contract. He takes his chance of being acceptable to the new council, and I see no hardship whatever in applying this construction to the plaintiff's case.

If the new council once accepted him as their clerk, I think, as already intimated, they cannot dismiss him without cause, except on incurring the usual liability for removal of an officer, appointed for the year, before the expiration thereof.

It is admitted that plaintiff has been paid his salary up to the day of his dismissal.

The fact that the existing clerk presides by law at the first meeting at which the new council organizes itself, by the election of a warden, is quite consistent with the view I have expressed.

Judgment for defendants.

ASHFORD V. VICTORIA MUTUAL ASSURANCE COMPANY.

Insurance—Chattel property—Condition as to encumbrance on realty—Construction.

To an action on a policy of insurance of chattel property, defendants pleaded that plaintiff, in his application, falsely, &c., stated that he held the property in which the goods insured were by deed and unencumbered, whereas said property was largely mortgaged, and that this should have been communicated to defendants, by reason of which, &c., &c. The evidence given, in support of this plea, was that to a question contained in a printed form of application, wholly inapplicable in many of the questions to insurance on chattel property alone, whether the property was encumbered, defendants' agent, at plaintiff's dictation, filled in the answer that there was no encumbrance, it further appearing that on this latter question being put plaintiff was about to explain that the *land* was mortgaged, when the agent stopped him, stating that that was of no importance, as the proposition was merely for insurance of goods, and that question related only to realty whereupon, the goods not being encumbered, the agent wrote the answer accordingly:

Held, that the question must be considered as relating to the goods insured, and not to the real property, and that the plea was therefore not proved.

DECLARATION on a fire policy, dated 8th November, 1869, on the contents of barn No. 1, barn No. 2, barn No. 3, and on the contents of a stable and sheds, the property of plaintiff, situated in concession 2, lot 1, Township of Hope, for six months; that the policy was made and accepted subject to statute chap. 52, Consol. U. C., which was to be used and resorted to to explain or ascertain the rights and obligations of the parties in all cases not otherwise provided for by the policy, in which there was a proviso, that in case of any fraud or false swearing all claim should be forfeited; with averment of interest and of destruction by fire.

Pleas—1st. *Non est factum*. 2nd. Traverse of loss. 3rd. That on application for insurance, on which the policy was based and which was a condition thereof, plaintiff falsely, fraudulently and wilfully stated that he held the property, in which the goods insured were contained, by deed and free from encumbrances, whereas in truth the lands and premises in which such goods were

situated at the time of the application were largely encumbered by mortgage, of which plaintiff was well aware and should have communicated same to defendants, and which was a material and necessary circumstance by said application required to be communicated at time of effecting insurance, by reason of which fraudulent misrepresentation and concealment policy became void.

Issue.

The case was tried at Cobourg, before Gwynne, J.

The policy was produced and described the property insured, as set forth in the declaration, as the contents of certain barns, stable and shed, "the property of the insured, situate in concession 2, lot 1, Township of Hope. It was the ordinary form of a Mutual Insurance Company, stating that plaintiff had become a member of the Company (general branch) and had paid, &c., as premium. The application was referred to for a more particular description and as forming part of the policy. Among the conditions endorsed were, in 8 and 9, provisions that the buildings insured, with the land on which they stood, were pledged to the Company under the statute, and if the insured did not possess an unencumbered title in fee simple to the buildings, and to the land covered by the same, the policy should be void, unless the true title should be expressed therein and on the application. The application was produced. It was a printed form; one column headed "Property for Insurance," under number

1. On dwelling house.	
2. On household furniture.	
3. On barn No. 1.	
4. On ordinary contents therein.....	\$1000
5. On barn No. 2.	
6. On ordinary contents therein.....	600
7. On stable and sheds.	
8. On ordinary contents therein.....	500
11. On contents of barn No. 3.	400
	<hr/>
	\$2500

Then came a list of printed questions :

1. Where situate ? Con. 2, lot 1, Township of Hope.
2. Size of lots on which buildings stand ? Eighty acres.
3. How many acres under cultivation ? All.

Then questions as to occupation and size of buildings, materials, and age, &c., &c.

24. Under what title is the property held ? Deed.

25. If encumbered, how and to what amount ? None.

26. What is the total value of property including land and buildings ? \$18,000.

It concluded with a declaration by plaintiff that he consented to be bound by the conditions of insurance set forth in the policy to be issued in accordance therewith.

On the back was a diagram or general plan of the premises proposed to be insured and all buildings within 500 feet, shewing the barns and stables, &c., and a dwelling 100 feet off.

Defendants' agent, at Port hope, who filled up the application, stated that plaintiff, when the questions were being answered, commenced to explain to him about the encumbrance upon the farm, but he stopped him, telling him it was of no importance, as it did not apply to his case, as the contents were all that was to be insured.

It was admitted there was an unpaid mortgage on the real estate.

It was objected that plaintiff could not recover on these grounds.

A verdict was taken for plaintiff for \$2089, with leave to defendants to move to enter it for them, if the Court (which was to draw inferences) thought it should be so entered, or to reduce the verdict.

In Easter Term, *Crooks*, Q. C., obtained a rule on the leave reserved, to which *H. Cameron* shewed cause.

Crooks, contra, cited 31 Vic. ch. 32, sec. 5 (Ont.); C. S. U. C. ch. 52, secs. 20, 24, 27; *Anderson v. Fitzgerald*, 4 H. L. Ca. 503.

HAGARTY, C. J.—U. C. Consol. ch. 52, sec. 10, allows Companies to insure the dwelling houses, stores, shops, and other buildings, household furniture and merchandize of the members thereof.

Sec. 20. "The Company may admit as a member the owner of any property movable or immovable lying within any part of Upper Canada or Lower Canada, and may insure the same, whether the owner of such property be or be not a freeholder *in the municipality, &c., in which the Company has been incorporated*; and every person so admitted a member shall have the same rights and liabilities as the other members.

Ch. 38 of 27–28 Vic., amends this clause, by omitting the words in italics.

By sec. 25 of the General Act every person assured becomes a member.

Sec. 67 makes the buildings insured, and land in which they are, pledged to the Company.

Sec. 24 allows the Company to collect premiums in cash for insurance for terms not longer than one year.

By sec. 5 of the Ontario Act (31 Vic. ch. 32), when policies are issued and premiums in cash collected thereon for periods of one year, as by law provided, the persons so paying shall not be held to be members of the Company in any respect, unless so constituted by the by-laws of the Company.

The insurance before us is for six months. I think we should read the last cited clause as if it said, "for periods of one year, or any shorter term, as by law provided."

The receipt given to plaintiff is as on a cash premium, not for a premium note. Some confusion is created by the use of printed forms applicable to insurance on the mutual plan.

I think the insurance before us must be treated in substance as unaffected by any of the special provisions applicable to Companies on the mutual principle. They are now allowed to insure movable property in Canada, east or west, without requiring the owner to be a freeholder.

The stringency of the general Act (ch. 52), making void policies if title encumbered, or the encumbrance not set out, is relaxed by the amending Act of 1864, sec. 5, making the policies only voidable at the option of the directors. The tendency of this legislation seems doubtless to give to these Mutual Companies, as nearly as possible, the same general powers of insurance as the ordinary Companies possess. I notice these statutable matters as bearing on a portion of Mr. Crooks's able argument as to the materiality of all statements as to the real property or buildings thereon, in which chattels insured may be contained.

Looking at the whole legal aspect of the case, I am of opinion that we should construe the application and the questions and answers substantially as if the defendants were not a Mutual Company.

Question 24. Under what title is the property held?
Answer. By deed.

I think, in common fairness to the assured, we should intend this to relate not to the realty, but to the subject matter of the insurance—the property insured.

The next preceding question is, What other insurance (if any) on the same property? Answer. On hay and grain, \$600; on barn, \$1200.

Now, then, the words "same property," must, I think, mean the property insured, and the possible fact that an insurance existed on his dwelling house could never be held to be a false statement or concealment. The whole list of printed questions and answers shews what is and what is not the subject of insurance.

The literal construction here is certainly in favor of justice between the parties, and we should adhere to it. A statement that he held the property insured by deed, and that it was unencumbered, cannot in any way support the defence set up.

I think the defence fails. The view I take of the facts renders a discussion of the authorities cited unnecessary.

GWYNNE, J.—I am of opinion that the defendants have failed to establish their third plea. That plea is, that on

the application for the insurance, which forms part of the policy, the plaintiff falsely, fraudulently and wilfully stated that he held the property, in which the insured goods were contained, by deed and free from incumbrance, whereas in truth and in fact the said land and premises, in which such goods were situated at the time of the said application, were then largely encumbered by mortgage, of which the said plaintiff was then well aware, by reason of which fraudulent misrepresentation the policy became and is void.

The evidence offered in support of this plea, in substance, was, that the agent of the Company, upon the plaintiff applying to insure, produced a printed form of application, prepared for application for insurance upon buildings and real property, *with* their contents, in which were contained many questions wholly inapplicable to an insurance upon chattel property alone. The agent filled in the answer to these questions at the dictation of the plaintiff. The 24th and 25th questions in this application are, (24). "Under what title is the property held?" in answer to which is inserted the word "Deed." The 25th question is, "If encumbered, how and to what amount?" Upon this question being put the plaintiff was proceeding with a statement of a mortgage which there was upon the land, when the agent stopped him, saying that that was of no importance, as the proposition was only for the insurance of chattel property, and the question only related to an insurance of real property, and the chattel property proposed to be insured not being encumbered, the agent wrote, in answer to this question, "none."

Now, admitting the agent of the Company to be, as the policy declares he shall be regarded as, the agent of the plaintiff in filling up the application, still it is plain, upon this evidence, that the plaintiff made no representation to the effect alleged in the plea, unless the word "None," written in the answer to the 25th question, is such a representation, and I am of opinion that it is not. That question, in all reason, must be construed to relate to the

property proposed to be insured, and not to the real property, where the chattel property proposed to be insured was situate.

If the defendants, when insuring chattel property only, desire to be informed as to the condition of the title of the realty, where the chattel property is situate, as a condition of insuring the chattel property, they must frame their questions less ambiguously, and in such a manner as not to entrap applicants for insurance into a forfeiture of the policy which they were endeavouring to effect. The defendants having abandoned all objection to the mode of determining the amount of the damages for which the verdict was rendered, the plaintiff will retain his verdict for the full amount.

Rule discharged.

BRILL V. THE GRAND TRUNK RAILWAY COMPANY.

Action for non-delivery of goods—Jus tertii—Damages—Tender.

Plaintiff had sold certain goods to M., which were at the time lying at defendants' railway station, and *defendants were fully aware of the sale*, but notwithstanding they contracted with plaintiff to carry and deliver them for him as required, and gave him a shipping bill accordingly. In an action by plaintiff against defendants for the non-delivery, *Held*, that defendants could not set up M.'s title to the goods as against the plaintiff.

It further appeared that beyond the fact of M. having notified defendants of his claim, and making a demand for the goods, he did nothing to indicate his intention of looking to them for damages, but in fact sued plaintiff and recovered the whole amount of his claim from him: *Held*, that the case could not be brought within the principle of a bailee setting up the *jus tertii* against the bailor, as there was here no *bonâ fide* defending in right and title of such third person. *Held*, also, that plaintiff was entitled to recover the whole value of the property converted, and not merely the difference between the price at the time of refusal to deliver and tender of it back again.

The tender in question was made in writing by defendants' solicitor, two days before the Commission Day of the Assizes, offering for plaintiff's acceptance the 50 kegs of butter (the goods in question), sold by him to M., and for which M. had recovered against him, stating same to be at T. at plaintiff's own risk: *Held*, wholly illusory, and not to partake of any of the incidents of a legal tender.

ACTION against defendants, charging, in the 1st count of the declaration, a delivery of goods by plaintiff to

defendants for carriage from Guelph to Toronto; *breach*, non-delivery. The 2nd count charged a delivery of goods by plaintiff to defendants, to be kept and returned to him, or carried for him, at his option; that he directed them to be carried to and delivered for him at Toronto; *breach*, non-delivery and loss of goods. The 3rd count alleged delivery of goods, to be kept and re-delivered on request; *breach*, non-delivery on request. The 4th count was in trover. 5th, Detinue.

Pleas—1, A traverse of the receipt of goods by defendants, as alleged in 1st and 2nd counts; to 3rd count, *non assumpsit*; to trover count, not guilty, and denial of property; to detinue count, *non-detinet*, and traverse of property.

Issue.

The case was tried at Toronto, before Wilson, J., without a jury.

It appeared that plaintiff was a produce dealer, and that in October, 1869, 50 kegs of butter arrived for him at the Guelph station. A son of plaintiff's proved a shipping bill of defendants, dated 8th October, 1869, acknowledging the receipt of this butter from plaintiff, to be sent to Toronto to plaintiff's order. He said that plaintiff had, the day before, sold this butter to one McKenzie, and been paid for it, and McKenzie had come to the station, seen the butter there, and marked it R. T., as he understood, "Robert Thompson, of Toronto." At the foot of the shipping bill was written, "Deliver to Morrison, Taylor & Co.," signed by witness for plaintiff. No delivery order was given to McKenzie. Witness proved demand on defendants, in Toronto, for the butter.

Collins, defendants' agent in Guelph, proved that the butter was at the station as plaintiff's property, and that McKenzie and plaintiff's son were there about a sale of the butter, and he (witness) understood it was sold to McKenzie, but the next day George Brill told him not to deliver it to McK. without plaintiff's order, and to this witness agreed, refusing to give it to McK. without an

order. Mr. Guthrie, a lawyer, came to him on McK.'s account, and shewed him plaintiff's receipt for the purchase money of the butter: witness told him he would hold it. Shortly afterwards plaintiff came and demanded the shipping bill for Toronto. Witness told him it belonged to McK. George B. said it was none of his business, and he asked did McK. pay the freight, when witness answered no. Plaintiff said if he paid the freight he would give it to him. Finally witness gave plaintiff the shipping receipt already mentioned, and the butter was sent to Toronto where witness thought both parties wanted to have it. A replevin summons was served on witness, as he stated, but the butter had then been sent to Toronto.

This was the plaintiff's case. After some objections taken, leave was given to add a plea denying plaintiff's property in the goods mentioned in the first three counts.

The learned Judge allowed each party to amend. The amended pleas to the first three counts set up McKenzie's title, and justified refusal under him. Plaintiff replied, taking issue on these pleas, and setting up an estoppel on defendants, by their entering into the contract with plaintiff to carry for him to Toronto, after full knowledge of McKenzie's claim, and that plaintiff was acting against such claim.

McKenzie was called. His purchase of the butter was not disputed. He said he made a sale of it, the same day, to Morrison, Taylor & Co., Toronto. He went to Toronto, and demanded it of defendants, and said he would look to them. At the same time, plaintiff's agent was demanding it also. On 18th October, he commenced an action against plaintiff, and was subsequently paid damages and costs, and said he was satisfied. Money was paid into Court, which he took out.

This action was commenced 16th October, two days before the action against plaintiff. The pleadings in the action against plaintiff were put in by consent. There were counts, on the contract, in trover, and money counts.

On the money counts defendant Brill paid \$727.60 into

Court, which McKenzie accepted. Brill then pleaded further that this money was paid all on the one transaction on the contract, and for alleged conversion of the goods, and the money paid. McKenzie replied, confessing the truth of this, and praying his costs. Judgment appeared to have been entered in January, 1870.

After an unsuccessful application for an interpleader, in November, the defendants applied for a rule for interpleader on plaintiff and McKenzie, in December, 1869, on affidavits setting forth the facts. After taking time to consider, this Court refused the application, considering that defendants had, with full notice of the rival claims made a new contract with the plaintiff. On 8th January, 1870, defendants gave notice to plaintiff in writing to this effect, that as Brill had paid McKenzie \$728.52 for 50 kegs of butter sold to him by plaintiff, defendants thereby tendered to plaintiff said 50 kegs, without prejudice to plaintiff's right to damages, and that the same were at Toronto at plaintiff's own risk. This was two days only before the Commission Day of the Assizes. The learned Judge was of opinion that defendants could set up McKenzie's title, and there was no estoppel on them, as at date of their shipping receipt to plaintiff the property was in fact McKenzie's, to defendants' knowledge, and the receipt did not alter their legal rights; they had possession for McKenzie, and did not get it from plaintiff by reason of the 8th October arrangement; that when *this action was brought* there was no evidence of plaintiff's and McKenzie's rights being altered; that what McKenzie had since done was of no consequence; that, at all events, plaintiff was entitled only to nominal damages, and to the difference in fall in the price of the butter from 17th October (the day of demand) and its price on the 8th January, when it was tendered, the plaintiff getting the butter back again. He entered verdict for defendants, with leave to plaintiff to move to enter it for him for such sum as the Court should direct, if, on the evidence, the Court thought plaintiff entitled to recover.

Anderson obtained a rule on the leave reserved; or for judgment *non obstante veredicto* on the first three counts; or to rescind the order made by the Judge as to the amendment of the pleas, &c., &c.

M. C. Cameron, Q.C., shewed cause, citing *Sheridan v. The New Quay Co.*, 4 C. B. N. S. 646.

Anderson and *Palmer*, contra, referred to *Thorn v. Tilbury*, 3 H. & N. 534; *Biddle v. Bond*, 6 B. & S. 225; *Sheridan v. The New Quay Co.*, *supra*.

HAGARTY, C.J., delivered the judgment of the Court.

This is a somewhat singular case, and has involved much litigation.

I am not prepared to adopt the learned judge's view, that it is a case only for nominal damages, or for the difference between the price at time of refusal and of tender. I think, if the plaintiff be entitled to recover at all, he is entitled to the whole value of the property converted.

Primâ facie, at all events, the plaintiff was entitled to these goods on the 8th October, when defendant gave him the shipping receipt. If, after having done so, defendants had then been first apprized of Mr. McKenzie's claim, it seems to me they could set such claim up against plaintiff, if defending *bonâ fide* under McKenzie's superior title. The law endeavours to protect persons like carriers, and one of the reasons alleged is, as said by Willes, J., in delivering judgment in *Sheridan v. New Quay Company* (4 C. B. N. S. 649), "the defendants were common carriers and therefore bound to receive the goods for carriage. They could make no enquiry as to the ownership. They have not voluntarily raised the question: it was raised by the demand of the real owner before defendants had parted with the goods. The law would protect them against the real owner, if they had delivered the goods, in pursuance of their employment, without notice of his claim. It ought equally to protect them against the *pseudo* owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods and

their being given up to him. The compulsory character of the employment of a carrier furnishes ample ground for so holding."

In *Wilson v. Anderton* (1 B. & Ad. 450) Lord Tenterden says, "The situation of a bailee is not without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity; but a bailee who forbears to adopt that mode of proceeding and makes himself a party by retaining the goods for the bailor must stand or fall by his title." In the argument a *Nisi Prius* case was cited, in which Gould, J., refused to allow the carrier to set up a *jus tertii* against his bailor. Littledale, J., says, in reference thereto, "There the carrier, on the goods being demanded by a third party, voluntarily identified himself with that party, by proposing to retain them on an indemnity, and offering to set up the title of that party, in an action by the bailor. Now, a lessee cannot dispute the title of his lessor at the time of the lease, but he may shew the lessor's title has been put an end to, &c., &c."

After defendants made the contract with plaintiff to carry to Toronto, nothing fresh occurred to raise any new right in McKenzie: all his right was complete, to defendants' knowledge, when they voluntarily made a fresh engagement with plaintiff.

On this ground chiefly the Court refused to grant defendants' application for an interpleader. At page 10, 20 C. P. it is said, "I think it impossible to relieve them under such facts. They seem to have deliberately chosen their side in the dispute, and to have knowingly cast in their lot with one of the disputants."

There was no legal obligation on them to make this fresh engagement with plaintiff. The reasons given in the cases cited for allowing them to set up the *jus tertii* against their bailor are here wholly wanting.

Another point is also to be considered. As I understand the law, the bailee, setting up the right of a third person against his bailor, must be *bonâ fide* defending on

the right and title of such third person. I hardly see how defendants can establish that such is their position.

Beyond the fact of McKenzie having notified defendants of his claim and making demand on them in Toronto, he seems to have done nothing to indicate his intention to look to them for damages. On the contrary, two days after the plaintiff commenced this suit against defendants, McKenzie, instead of suing defendants, issued his writ against Brill, the plaintiff, and recovered the whole amount of his claim from him; so that the plaintiff has paid McKenzie in full, and the goods now sought to be recovered are wholly free from any ownership except plaintiff's. The general rule is clearly expressed in *Biddle v. Bond* (6 B. & S. 225). Blackburn, J., says: "We think the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury v. Scotsford* (Yelv. 22); viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. * * * Nor is it enough that an adverse claim is made upon him, so that he may be entitled to relief under an interpleader. We assent to what is said by Pollock, C. B., in *Thorne v. Tilbury* (3 H. & N. 534), that a bailee can set up the title of another only if he defends upon the right and title and by the authority of that person. Thus restricted we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences."

I think it impossible to bring the defence in this suit within this principle.

It was pressed upon us that we must look at things as they stood the day the action was commenced; so that if McKenzie's title were then clear it suffices to prove the defence. I do not think so. If this view be rigidly held it would generally exclude the very proof, required in the case last cited, necessary for the defence.

If the third person had withdrawn his claim the day

after this suit was commenced, or plaintiff had satisfied him by payment, or otherwise, the carrier could still vexatiously continue the defence.

I think it impossible, on the evidence before us, to hold that this action was defended and plaintiff's claim resisted "upon the right and title, and by the authority," of McKenzie. The latter by his prompt action against plaintiff indicated very clearly the course he intended to take.

As to the alleged tender. I think it was wholly illusory to make such an offer as Mr. Bell made to plaintiff in his notice served two days before the time for trial, and especially in respect of an article of fluctuating price and perishable character. It cannot partake of any of the incidents of a legal tender.

I think on all the grounds stated the rule must be absolute to enter verdict for plaintiff for the amount claimed, which we understand to be 4280 lbs., and on the evidence we allow eighteen cents a pound, making in all \$770.40.

Rule accordingly.

MARTIN V. HOME INSURANCE COMPANY.

Insurance—Covenant against misrepresentations—Avoidance of policy.

By a policy of insurance the assured covenanted that his application contained a just and *true* exposition of all the facts respecting the condition, &c., of the property insured, and that if any material fact should not have been fairly represented the policy should be void; and it was also provided that the insurance might be continued for any agreed length of time on payment of premium, and renewal receipt being given, the continuance to be considered as under the original representation, except where varied by new representation in writing, &c. On the application for insurance the assured was asked whether there was any incumbrance on the property, to which he answered in the negative. Subsequently, in consequence of an agreed reduction in the premium, a new policy was issued on the same property and for the same amount, no new application being made or questions asked or answered. It turned out that there was in fact an incumbrance on the property :

Held, that in the absence of direct evidence to the contrary, this latter policy must be assumed to have been based on the then existing written statement by the assured as to the general state and title of the property, and that the insurers, unless explicitly notified to the contrary, had a right so to consider it; and therefore, *Held*, that the assured could not recover.

THIS was an action on a policy of insurance, dated 10th December, 1868, for \$3000 on a steam saw mill, engine, boiler, belting, and other machinery.

Pleas—1st, *Non fecit*; 2nd, Concealment of material fact, and false representation that property was not mortgaged, whereby policy was avoided; 3rd, That there was fraud and false swearing in proofs; 4th, Denial of loss; 5th, Plaintiff not interested at time of loss.

The trial took place at Whitby, at the last Spring Assizes, before Gwynne, J.

The evidence on the second plea was as follows:

Alexander Martin (the plaintiff): "I do not mind whether I read over this application for insurance in August before I signed it or not. This was the only application I signed. I signed none in December. I do not know in whose handwriting the answers in the body are, but the signature is mine. The mortgage to Glen was then in existence, which the agent well knew. I have no recollection of any such questions being put to me. I do not recollect speaking to any one but Mr. Young about the matter, and he knew all about the mortgages. He knew all about my affairs and that I was giving a chattel mortgage to Glen. He knew all about my affairs before there was any insurance at all * * * I was paying at the rate of 7 per cent. on the first policy, and at the rate of 6 per cent. on the second. I suppose I got a receipt for my money when I paid the premium, although perhaps not, for I gave a cheque for the amount payable to order, which was a receipt. The cheque mentioned what it was given for. At the time of the second insurance there had been a fire in Bowmanville. One of the agents was then in town settling it up. I disputed with Mr. Young about giving 7 per cent., and he said, 'we will see the agent who is in town.' We went and saw the agent and arranged for 6 per cent."

Silas B. Fairbanks gave evidence to the effect that Mr. Young, the defendants' agent, was aware of the existence of the mortgages before the insurance was effected.

Alexander Stanley, a witness, examined on behalf of

the defendants, said : " I am general agent in this province of the Home Insurance Company. Mr. Young was local agent at Bowmanville. His authority as such was to receive applications for insurance and forward them to the head office for acceptance, and if accepted they notified him. The local agents generally fill up the policies in blank forms, which are furnished by the Company to them. It was material to the risk to know whether the property was incumbered. The Company invariably refuse to insure property which is largely incumbered. I presume the reason is to guard against arson. My authority is to examine all agents, their books, &c., and to adjust and settle losses in the Dominion. I never knew of these mortgages, nor did the Company until after the fire. I have power to authorize acceptance of policies, also to cancel and reject. Had I known of these mortgages I would not have permitted these policies to be effected. * * * The policy of 10th December has never been adopted by the Company since I acquired a knowledge of the incumbrance. I cannot tell what Mr. Young communicated to the Company. I am quite sure if the Company had known of the incumbrance they never would have accepted the risks." * * *

The form of application, as regarded the question in issue in this case, was, " Every question must be fully and distinctly answered. If any interrogatories are not answered in writing by the applicant, or if any statement is omitted when it is required, it is assumed that the facts in relation to these are most favourable to the risk and they are so construed in writing the policy." * * *

" The applicant will answer the following questions and sign the same, as a description of the premises, on which the insurance will be predicated :—Question 16. Are the buildings and machinery both owned by the applicant ? Is there any other person interested in the property ? Answer : Owned by applicant. No. Question 20. Is the property mortgaged or otherwise incumbered ? If so, state the amount. Is there any insurance by the mortgagee ? Answer : No.

At the foot of the application was the following: "And the said applicant hereby covenants and agrees to and with the said Company that the foregoing is a just, full and *true* exposition of all the facts and circumstances in regard to the condition, situation, value and hazard of the property to be insured, so far as the same appertain to the risk." * * *

In the policy the following covenants were contained: "And the assured covenants and engages that the representation given in the application for this insurance contains a just, true and full exposition of all the facts and circumstances in regard to the condition, situation, value, and risk, of the property insured, so far as the same are known to him and material to the risk, and that if any material fact or circumstance shall not have been fairly represented * * * that in any such case the risk hereupon shall cease and determine, and the policy be null and void. * *

"The interest of the assured, whether as owner, consignee, factor, mortgagee, lessee, or otherwise, in the property to be insured, shall be truly stated in the policy, otherwise the same shall be void. * * *

"Insurance once made may be continued for such further time as may be agreed on, the premium thereof being paid and a renewal receipt being given for the same, *and it shall be considered as continued under the original representation in so far as it may not be varied by a new representation in writing*, which in all cases it shall be incumbent on the party insured to make when the risk has been changed either within itself or by the surrounding or adjacent buildings.

"This policy and all renewals thereof is made and accepted upon the above express conditions." * * *

The jury found for the plaintiff, and leave was reserved to the defendants to move to enter a nonsuit, on the grounds set out in the rule below.

Harrison, Q.C., obtained a rule to set aside the verdict and enter a nonsuit, on the leave reserved, on the ground

that plaintiff, in his application for insurance, represented the property to be unincumbered, which was untrue; and also because of false swearing in plaintiff's proofs, in which he stated that no other person was interested in the property insured, except one Glew and one Halton, whereas the Messrs. Gibbs were also interested therein.

M. C. Cameron, Q.C., shewed cause, citing *Ross v. Commercial Union Assurance Co.*, 26 U. C. 552; *Osser v. Provincial Insurance Co.*, 12 C. P. 133.

Harrison, contra, cited *Anderson v. Fitzgerald*, 4 H. L. Ca. 503; *Mason v. Agricultural Association*, 18 C. P. 22; per VanKoughnet, C., p. 27, per Mowat, V.C.; *Duckett v. Williams*, 2 C. & M. 348; *Halton v. Hartley*, 1 T. R. 343; *Cazenove v. British Equitable Insurance Co.*, 6 C. B. N. S. 437, 1 L. T. N. S. 484, 6 Jur. N. S. 826; *Fowkes v. Manchester and London Life Assurance, &c., Association*, 3 B. & S. 917; *Duncan v. Sun and Fire Insurance Co.*, 6 Wend. 488; *Readhead v. Midland R. W. Co.*, L. R. 4 Q. B. 379; *Arnould Insurance*, I. 577; *Angell, Insurance*, sec. 143, note z.

HAGARTY, C. J.—As to the policy on the mill, &c., when plaintiff effected insurance on 10th August, 1868, in his answer to the question if there be any encumbrance on the property, he answers "No." I think he must be held bound by this representation, without reference to the manner in which it was said to have been filled up. It was on this that the directors decided on accepting or declining the proposal. In the policy issued on this proposal he is made responsible for the truth of his representations. It is provided that insurances once made may be continued for such further term as may be agreed on, the premium being paid and a renewal receipt being given for the same; and it shall be considered as continued under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, &c., &c.

The policy granted on the 10th December, when the last insurance expired, was on precisely the same property, with the same amount insured on each ; but the defendants had consented to reduce the rate at plaintiff's request. No new application was in fact made, or questions in writing asked or answered. It contains the words as in the preceding, "And the assured covenants, &c., that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to ———, and material to the risk, * * * or if the title to the said property shall be in any way changed, &c., &c., without assent, policy to be void," &c., &c.

I think that, at all events, in the absence of any direct proof to the contrary, it should be assumed, as a matter of law, that the policy issued on 10th December was based on the then existing written statement of plaintiff as to the general state and title of the property.

In form, perhaps, we should not call this a renewal of a policy, as a new formal contract was entered into, and the whole thing was certainly, in substance, rather what is called a continuance of an insurance once made. We think the defendants, unless explicitly notified to the contrary, have a right to consider the existing written representation as the basis of this contract to continue insuring the same properties for the same amounts. Had the application for the August insurance described the buildings as of stone, covered with metal, when in truth they were all of wood, I have no doubt that the defendants, acting, as they did here, in continuing the risk, by the issue of the new policy, and no fresh application made or explanation offered, would be held as contracting on the faith of the application already in their hands. I have therefore arrived at the conclusion that the plaintiff must fail on this portion of his claim.

[His Lordship then proceeded to dispose of another point raised by the rule, but as it was altogether a matter as to

whether the finding of the jury in favour of the defendants was justified by the evidence, which he held that it was, it is not considered material to insert this portion of the judgment.]

GALT, J.—As the counts in the declaration are for different causes of action* and must be decided on different principles, it will be convenient to consider them separately. There is no necessity to refer to the evidence as respects the amount of loss in the first count mentioned, as it was clearly proved that the loss was equal to the amount insured. It was also proved that the plaintiff was interested at time of loss, and the execution of the policy was admitted. The right of the plaintiff to recover must therefore depend on the issues raised by the second or third pleas. I will dispose of the latter issue first. The third plea avers that plaintiff was guilty of fraud and false swearing in the proofs of loss furnished by him in this, “that it is therein falsely sworn that the property belonged to plaintiff and that no other person had any interest therein, except F. W. Glen and Milton E. Hollen, to whom the same was mortgaged, whereas Thomas N. Gibbs was also interested therein as a mortgagee.” At the close of the case the learned Judge submitted this question, “was the fact of the existence of that mortgage omitted from the plaintiff’s proof papers from any fraudulent intent? To this the jury replied, “Not from any intent to defraud.” We think that the evidence fully justified the jury in arriving at this conclusion; but the opinion which we have formed on the second plea renders any decision on this question unnecessary.

From the evidence of the plaintiff, and also from the documents produced, he appeared to have signed only one application, namely, that on which a policy dated 10th August, 1868, was issued by the defendants. This policy

* There were two counts in the declaration, but as nothing turned on the second material to report, the first count, with the pleas thereto, has been alone inserted.—REPORTER.

was in every respect, except as regarded the rate of premium and duration, identical with that sued on.

The plaintiff in his testimony stated : "I was paying at the rate of 7 per cent. on the first policy, at the rate of 6 per cent. on the second * * * At the time of the second insurance there had been a fire at Bowmanville : one of the agents was then in town settling it up. I disputed with Mr. Young about giving 7 per cent., and he said we will see the agent who is in town. We went and saw the agent and arranged for 6 per cent." We think that on the evidence on this plea it is impossible to avoid saying that the second policy was a renewal of the first, except as regards the amount of premium, and this is in accordance with the conduct of both Mr. Young and the plaintiff in not requiring and making a second application. It was necessary that there should be a new policy, because the rate of premium was changed, but it was unnecessary to prepare and forward a new application, because the risk was the same. If this is so, then, under the express conditions of the policy, the renewal "shall be considered as continued under the original representation," and the question is, was that representation true ? It is beyond dispute that it was not. It may be quite true that there was no intention on the part of the plaintiff to commit a fraud on the defendants, but it must be remembered that the defendants had done all in their power to call the attention of persons, desiring to obtain insurance, to the condition and representations which they deemed material, and on which alone they were willing to contract, and if the applicant will not take the trouble to read the questions and answers before he vouches for their truth by his subscription, he has no one to blame but himself. It is also manifest that it is reasonable that an insurance company should desire to know something of the affairs of the applicant, particularly as regards the risk they are desired to assume, and that they may well make it a condition of their contract that the information given on that point shall be true, and to declare that if any misrepresentation

was made that the policy should be void. The defendants have done so in this case, and we see no reason why they should be precluded from availing themselves of the answer to the 20th interrogatory as a defence to their action. It is true that the local agent of the defendants appears to have had a personal knowledge of the existence of the mortgage in question, but this, in our opinion, can make no difference: the defendant must have known that when he gave the answer which he did give, he was not disclosing the truth, and he also knew that the application would be sent for approval to persons who had no such personal knowledge as the local agent.

The whole law as bearing on this subject has been fully considered by the Court of Appeal: *Mason v. The Agricultural Mutual Assurance Association* (18 U. C. C. P. page 19). The point in dispute in that case was whether a false statement of title in the proof of loss vitiated the policy, and the Court held that under the circumstances therein set forth, it did not; but the late Chancellor, in giving the judgment of the Court, says: "For aught that appears on this issue and on the pleadings generally, the defendants were aware of the exact state of plaintiff's title, and were not therefore in any way deceived in regard to it when they granted an insurance. They do not, at all events, complain that they were. If they had been, the case presented would have been very different, for an insurance company may well choose not to know or learn anything except through the person making insurance, and may say to him, 'Upon the faith of your statements we grant you an insurance. You warrant everything you state in regard to certain particulars on which we require information: with their materiality, or with your *bona fides* of statement in regard to them, we will have no question. You run the risk of stating the truth: we make no further enquiry, and if your statement, on the faith of which we issue the policy, be untrue in any respect, the policy is valueless.' The assured accepting a policy on such conditions has no right afterwards to complain that the insurer insists upon them."

In our opinion the defendants have required the exact fulfilment of such condition in this case. At the foot of the application the covenant hereinbefore set out is distinctly stated, and in the policy itself the assured covenants and agrees that the representation given in the application for this insurance contains a just, true, and full exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to him and material to the risk; and if any material fact or circumstance shall not have been fairly represented, that in any such case the risk hereupon shall cease and determine, and the policy be null and void." It is true that no application was made on which the present policy was issued, but we think, as we have already stated, that this policy must be looked upon as a renewal of that of the 10th August, and the plaintiff is bound by the statements made in his other application. In our opinion, therefore, the policy set forth in the first count is void, and the plaintiff cannot recover on it.

GWYNNE, J., concurred.

Rule absolute.

HUMPHREYS ET AL. V. HUNTER.

Religious Institutions Act (C. S. U. C. ch. 69)—Ejectment by trustees—Law Reform Act—Construction—Evidence.

Held, that the trustees under C. S. U. C. ch. 69, may maintain ejectment in their individual names with the subjoined description, "as trustees," &c., &c., stating the name of the congregation or religious body for whom they are trustees, according to the designation in the deed of conveyance.

At the trial evidence was tendered to shew that the congregation named in the deed, which was proved to have been made to the trustees on their appointment in 1864, had ceased to exist before the execution of the deed: *Held*, that this was properly rejected; as also evidence to shew that defendant held under the obligees of a bond, in discharge of which the deed was executed.

Held, also, that the action of ejectment is within the 18th section of the Law Reform Act (Ont.), and *Seemle*, that such action *must* be tried without the intervention of a jury, subject only to *the Judge's* discretion to direct one.

THIS was an action of ejectment brought to recover a piece of land situate in the City of Toronto.

The plaintiffs were described in the writ of ejectment as John Humphreys, John Kidd, and David Kidd, trustees of the Reformed Presbyterian Congregation of the City of Toronto.

The plaintiffs, in their notice of claim, asserted title to the lands and premises in question under and by virtue of a deed of said lands executed by one Isaac White to them.

The defendant, besides denying the title of the claimants, asserted title in himself, "as tenant of John Hughes, John Blain, and others, the trustees elected by the above-named congregation."

At the trial, before Galt, J., the plaintiffs produced and proved an indenture, made the 27th day of August, 1866, in pursuance of the Act to facilitate the Conveyance of Real Property, between Isaac White, of the first part, Jane, his wife, of the second part, and the plaintiffs, described as "John Humphreys, John Kidd, and Daniel Kidd, trustees of the Reformed Presbyterian Congregation, in the City of Toronto, in connection with the Synod of the Reformed Presbyterian Church of North America, *of the third part.*" This deed recited as follows: "Whereas a certain religious association of Christians, in the said City of Toronto, otherwise known as the Reformed Presbyterian Church, in the City of Toronto, in connection with the Synod of the Reformed Presbyterian Church in North America, are desirous of taking a conveyance of the lands hereinafter described, for the site of a church or chapel, and for the support of Christian worship in connection with said Reformed Presbyterian Synod, and for that purpose have appointed the said John Humphreys, John Kidd, and Daniel Kidd, *the parties hereto of the third part*, as trustees, to whom, and their successors, to be appointed in manner specified by the laws of the said Reformed Presbyterian Church in North America, the land requisite for such purposes might be conveyed, and which said trustees, and their successors in perpetual succession, by the name of the Trustees of the Reformed Presbyterian Church, in the City of Toronto, in connection with the said Synod of

the Reformed Presbyterian Church in North America, might take, hold, and have such lands, and have and exercise all such rights and powers in relation thereto as are by the statutes of the Province of Canada in that behalf conferred, and, amongst others, in pursuance of the 'Act respecting the Property of Religious Institutions in Upper Canada;'" and the indenture witnessed that the said Isaac White, in consideration of the sum of £275, of lawful money of Canada, to him in hand paid by the *said parties of the third part*, as such trustees, and on behalf of such congregation, did give, grant, bargain, sell, assign, transfer and convey *unto the said parties of the third part*, as such trustees of the said Reformed Presbyterian Church, in the City of Toronto, *their successors and assigns*, the said lands, tenements, &c., &c., describing them, to have and to hold the said lands, &c., &c., to the said the trustees of the Reformed Presbyterian Church, in the City of Toronto, their successors, to be appointed as hereafter mentioned, and assigns, upon the trusts following, that is to say, *upon trust* for the members of the Reformed Presbyterian congregation in the City of Toronto, in connection with said Synod, holding the doctrines and principles of such Synod, and the government and modes of management of church property of congregations belonging to or in connection with such Synod, as now held and practised by such Synod.

This deed was executed by Isaac White, and Jane, his wife, in the presence of one subscribing witness, and was registered in the Registry Office of the City of Toronto on the 24th day of August, 1867.

For the plaintiffs it was proved that, in the month of September, 1864, the plaintiffs were duly appointed, in the regular way, as trustees, in lieu of those formerly trustees, to hold the property of the congregation in trust for its behalf. White, the grantor in the deed, was called, and from his evidence it appeared that before the execution of the deed he executed a bond, in the month of October, 1851, to William Dickson, Richard Eiles, Alexander Bailey,

William Loudon, Joseph Oliver, Robert Dargood, and James Oliver, trustees named and appointed on the part and behalf of the Reformed Presbyterian Church, whereby the said Isaac White became bound in the penal sum of £600 of lawful money, subject to a condition thereunder written, that if the said Isaac White should, at the expiration of seven years from the date thereof, or at such other time as the said trustees or their successors in office should have paid the sum of £275, with interest thereon, make, do, and execute a good and sufficient conveyance, in fee simple, free from incumbrances whatsoever, to the said obligees, naming them, as trustees of the said Reformed Presbyterian congregation of the City of Toronto, or their successors, as such trustees aforesaid for the time being, their successors and assigns, of the piece of land in question, then the said obligation to be void. It was in fulfilment and discharge of this bond that the deed of August, 1866, was executed. Since the execution of that deed no change had been made in the trustees.

For the defendant it was contended that the plaintiffs could not recover, because the suit was brought by them as individuals, whereas the deed produced shewed title in a corporation; that the deed, if to the plaintiffs as individuals, was void under the Statute of Mortmain, there being only one witness, and because it was not registered within six months.

The learned Judge held that the plaintiffs were entitled to recover as trustees. Counsel for defendant then proposed to prove that the congregation mentioned in the deed had ceased to exist before the deed was executed. Plaintiffs having been proved to have been appointed trustees in 1864, and the deed having been made to them as such trustees, the learned Judge refused to receive this evidence. Counsel for the defendant then proposed to shew that the defendant held under the persons named as obligees in the bond, but the learned Judge refused to receive this evidence in derogation of the deed, which was executed in fulfilment of the obligation in the bond. A verdict was accordingly rendered for the plaintiffs.

In Hilary Term, *Scott*, for the defendant, obtained a rule *nisi* to set aside this verdict, upon the grounds taken at the trial, and upon the further ground that the cause was tried by the learned Judge without a jury, against the desire of the defendant's counsel.

This term, *M. C. Cameron*, Q.C., shewed cause, referring to C. S. U. C. ch. 69, secs. 1, 2, 7.

Scott, contra.

GWYNNE, J., delivered the judgment of the Court.

The question involved in the objection to the plaintiffs' right to recover in this action is, whether or not the provision of the 1st section of ch. 69, of the Consolidated Statutes of Upper Canada, to the effect that "religious societies or congregations of Christians may appoint trustees, to whom, and to their successors, to be appointed in such manner as may be specified in the deed, the land requisite for all or any of the purposes mentioned in the Act, may be conveyed, and that *such trustees* and their successors in perpetual succession, by the name expressed in the deed, may take, hold, and possess the land, and maintain and defend actions in law or in equity for the protection thereof and of their property therein," has the effect of so merging the individuality of the *persons*, to whom, as trustees, the land is by the deed originally conveyed, that *they* cannot sue in their own names, with the addition of "as trustees, &c., &c.," using the name given in the deed, but that the action *must be* brought by and in the name of the corporation or quasi-corporation, without naming the original trustees who are the grantees named in the deed, and who are personally made parties thereto.

It is to be observed that there is not contained in the statute the ordinary clause inserted in Acts of Parliament constituting a body corporate; but a corporation may be established by implication when the purposes intended *cannot be carried into effect* without attributing the corporate character to such body: *Conservators of River Tone v. Ash* (10 B. & C. 349); *Jeffreys v. Gurr* (2 B. & Ad. 833);

Ex parte Newport Marsh Trustees (10 Sim. 346). Now in the present case, the only object of a corporate character effected, or required to be effected, is, that the estate in the land shall pass from one set of trustees to another, in succession. This purpose, I should think, might have been effected as readily by a declaration that no deed shall be necessary to transfer the estate from the retiring trustees to their successors, but that, immediately upon the appointment of the successors, the estate shall be deemed to be transferred to and vested in them, so that the legal estate shall be always deemed to be in the trustees for the time being.

By the statute 17 Geo. III., ch. 17, for dividing Enfield Chase, a certain allotment of the land is vested in the churchwardens of Enfield for the time being, and *their successors for ever*, in trust for the owners and proprietors of freehold and copyhold messuages, lands, and tenements within the parish, who were entitled to a right of common, &c., within the Chase.

The declaration that the legal estate in these lands should vest *in the churchwardens and their successors forever* required a perpetual succession, and a construction that a corporation by implication was constituted equally as such construction is necessary under Consolidated Statute, ch. 69. Now, under 17 Geo. III., ch. 17, Aaron Patrick and John Pepper were indicted under 6 Geo. III., ch. 48, for cutting down, in the night time, trees growing on Enfield Chase (1 L. C. C. 253). The first count in the indictment laid the property as belonging to Joseph Brown, George Cook, and William Sedcole, then being the churchwardens of Enfield aforesaid, and then being the owners of said, trees. The second count laid the property as belonging to the same persons by name, they, the said Brown, Cook, and Sedcole, then being the churchwardens of the parish church of Enfield in the County of Middlesex. It was contended for the prisoners that a conviction could not be sustained, for that the trees were improperly laid as the property of individuals, by their private names, instead of

as the property of a corporation by their corporate name. The Court held that the indictment would have been clearly right if the first clause of the Act of Parliament stood alone, but by the 115th section of the statute it was enacted "that the present churchwardens of the parish church of Enfield shall be and are hereby incorporated and made one body politic and corporate, by the name of the Churchwardens of the Parish Church of Enfield, in the County of Middlesex, and shall have perpetual succession, and they and their successors shall be enabled to sue and be sued by the *name* aforesaid in any Court of judicature;" and it was *therefore* held that the property should have been laid as the property of the corporation.

By an Act of Parliament passed 14 Geo. III., ch. 30, certain persons therein named, *and their successors, to be elected and appointed under and by virtue of the said Act*, were appointed trustees for putting in execution all the powers thereby given for providing a workhouse, and for employing and maintaining the poor of the old Artillery Ground in the Liberty of the Tower of London, or for any matter or thing concerning the same, and all fixtures, furniture and other things bought or provided for the poor, are vested in the said trustees *and their successors*, for the purposes of the Act; and the said trustees are hereby empowered to prefer any bill of indictment against any person who shall steal, take, or carry away any or any part of such things, and the moneys and things which shall be so stolen, taken, or carried away shall in every such indictment be laid and deemed and taken to be the property of '*The Trustees of the Poor of the Old Artillery Ground*,' and every indictment so preferred shall be held good in law to all intents and purposes."

The question arose whether an indictment had well laid the property as belonging to "*The Trustees of the Poor of the Old Artillery Ground*." The Court held that it had not, for, as the Act of Parliament had not incorporated the trustees, the property should have been laid as belonging to A, B, and C, by their proper names, and the words

"*Trustees of the Poor of the Old Artillery Ground*" subjoined as a description of the capacity in which they were authorized by the Legislature to act: *Rex v. Sherrington* (1 L. C. C. 513).

These cases are, as it seems to me, authorities to the effect that an indictment laying property in the plaintiffs here, naming them, subjoining the description "as trustees," &c., &c., stating the capacity in which they were authorized by the Legislature to act, would be a good indictment, there being no clause specially declaring the trustees to be a body corporate.

Now, by reference to the Consolidated Statute, ch. 69, we find that the land *may be conveyed to the trustees appointed by the congregations*, and *such* trustees, and their successors, to be appointed in such manner as may be specified in the deed of conveyance, in perpetual succession, by the name expressed in the deed, *may* take, hold, and possess the land, and maintain and defend actions.

By the third section it is provided that the trustees, or a majority of them, from time to time, may execute a mortgage for certain purposes upon the lands held in trust.

By the 4th, 5th, and 6th sections it is enacted that "grantees in trust, named in any letters patent from the Crown, or the survivors of them, or the trustees for *the time being*, appointed in manner prescribed in the letters patent, whereby lands are granted for the use of a congregation or religious body, *may lease*, for any term not exceeding 21 years, *lands so held by them*, for the use of a congregation or religious body, at such rent and upon such terms as the trustees, or a majority of them, may deem reasonable, and in such lease *they may* covenant for renewal, at the expiration of every term, for a further term, upon such terms as may then, *by the trustees for the time being*, be agreed upon, or may covenant or agree for the payment to the lessee, his executors, &c., of the value of any buildings; but the trustees shall not so lease without the consent of the congregation or religious body for whose use they hold the land in trust, to be obtained as men-

tioned in the Act;" and by the 7th section it is enacted that the trustees for *the time being, entitled by law* to hold land in trust for a congregation or religious body, *may, in their own names*, or by any name by which they hold the land, sue or distrain for rent in arrear, and may take all such means for the recovery thereof as landlords in other cases are entitled to take. Now, the powers of leasing herein conferred are consolidated from 18 Vic., ch. 119, wherein the covenant for renewal entered into by one set of trustees is expressly declared to be binding upon their successors.

These sections, which I have extracted from the Act, as also others relating to *sales by the trustees for the time being*, where the land is no longer required to be retained for the use of the congregation, seem to recognize that the estate in the land is vested in the trustees for the time being, as natural persons, upon trust, however, for the use of the congregation. The Act recognizes the execution of mortgages and leases by the individual trustees, and makes the personal covenant entered into by them in such leases binding upon their successors; and it is specially enacted that they may in their own names sue, or distrain, for rent in arrear, and may take all such means for the recovery thereof as landlords in other cases are entitled to take. Now, under the old law the demise in ejectment was laid as the demise of the landlord, and he who was competent to be a lessor in fact in a lease was the proper lessor of the plaintiff in ejectment. So likewise, now, a person who is competent to be a lessor is competent to be a plaintiff in ejectment, and may eject a lessee for default of payment of rent or other default committed in violation of the terms of the demise; and if he may maintain ejectment in such case, I cannot see why he may not take all such means for the recovery, from any person wrongfully in possession, of the land which the Act recognizes him as entitled by law to hold in trust.

In my opinion the construction to be put upon the whole Act is, that the trustees for the time being have such

an estate vested in them that they may, by the express provisions of the Act, maintain an action of ejectment in their individual names, with the subjoined description, "as trustees," &c., &c., stating the name of the congregation or religious body for whom they are trustees, according to the designation in the deed of conveyance; or they *may* sue in their *quasi* corporate name alone without their individual names. *A fortiori* I am of opinion that these plaintiffs, *to whom the land was originally conveyed*, may sue as they have done here, describing themselves as trustees, &c., there having been no successors to them ever appointed; but in no event can the objection be available for the defendant in this case, because it is competent for us, I think, if necessary, to strike out the individual names of the plaintiffs, and they would still be entitled to recover under the name of "trustees," &c.

The learned judge, in my opinion, rightly refused to receive evidence that the congregation, for whose benefit the land was conveyed in trust, had ceased to exist before the deed was executed. The plaintiffs were appointed trustees to receive the deed in 1864; none others have been appointed since, and the plaintiffs can hold only as trustees for the congregation of Christians in the City of Toronto mentioned in the deed, which, if not existing in the city at the time the deed was executed, may be existing there now. However, the legal estate so conveyed to the plaintiffs is still vested in them on the trust stated. So also was the learned judge right in rejecting evidence for the purpose of shewing that the defendant claimed title under the obligees in the bond, who could give no title against the trustees to whom the land was conveyed. I am of opinion, therefore, that the deed is a good deed under ch. 69 of the Consolidated Statutes of U. C., and that notwithstanding the objection taken at the trial the plaintiffs are entitled to recover.

It is, however, contended that the defendant is entitled to a new trial, upon the ground that there was a mistrial, in this, that the cause was tried by the learned judge with-

out a jury, which, it is contended, is not authorized, in Ejectment, by the Law Reform Act of 1868. Now there is no form of action to which the beneficial provisions of the Law Reform Act *should* apply so reasonably as to ejectments. The points in such actions which for the most part arise are essentially points of law, and in practice the intervention of a jury in nine cases out of ten is wholly unnecessary. However, it is contended that the Act does not apply to actions of ejectment, because, according to the modern form of that action, although there is an issue to be tried, there is no pleading, and it is contended that the 18th section of the Law Reform Act applies only to actions in which there are pleadings. If this contention is well founded we must yield to it, however convenient we may think it to be that actions of ejectment should be triable and tried before a judge without a jury. Now the 18th section provides that all issues of fact, in any civil action, *may*, and, in the absence of such notice as in the next sub-section mentioned, *shall be* heard and tried by a judge of the said courts without the intervention of a jury; provided that if any one or more of the parties requires such issue to be tried by a jury, he shall give notice to the court, in which such action is pending, and to the opposite party, by filing with his last pleading, and serving on the opposite party, notice in writing to the effect following: "The plaintiff or the respondent requires that the issues in this cause be tried by a jury." The contention is that, as there is no *pleading* in ejectment, this notice cannot be given, and that therefore in ejectment the cause must still be tried by a jury; but a critical examination of the Act appears to lead to an opposite conclusion, for the language of the section, "all issues in fact in any civil action," comprise undoubtedly *issues in ejectment*, which, therefore, in the language of the Act, *may*, and in the absence of such notice as in the next sub-section mentioned, *shall be* tried by a judge without the intervention of a jury. Now, if, by reason of there being no pleadings in ejectment, there can be no such notice as required in order to prevent the

cause from being peremptorily tried by a judge, then the conclusion would rather seem to be that the action of ejectment, being within the enacting clause and not within the proviso or exception, *must be* tried by a judge without the intervention of a jury, subject to the proviso in the third sub-section, "that it shall be competent for the judge in his discretion to direct that notwithstanding anything hereinbefore contained, any such action shall be tried by a jury." This, I think, will be a sounder construction to put upon the Act than that which is contended for on behalf of the defendant.

Rule discharged.

WILSON V. BOCKUS.

Sale of goods—Purchase by agent—Indiscriminate appropriation among several principals—Trove against agent's assignee in insolvency.

M. received money from plaintiff and from others to buy grain on commission. He bought in his own name and from time to time appropriated the warehouse receipts among his principals, without distinguishing in his books, or otherwise, for whom any particular grain had been bought: *Held*, that under the circumstances, more fully set out below, plaintiff could not maintain trover against M.'s assignee in insolvency for grain not specifically appropriated to him.

TROVER; trespass to goods; detinue and common counts.

Pleas, not guilty, denial of property, and never indebted.

The trial took place at Picton, before Wilson, J.

Defendant was official assignee, to whom one McFaul had made a voluntary assignment, 22nd September, 1868. The claim was for the value of some wheat and rye, bought by McFaul for plaintiff, and stored in one Grey's warehouse, and for some barley, alleged to have been bought in the same manner, stored in one Bog's warehouse.

The defence as to this wheat and rye was abandoned, and the only question was as to the barley.

McFaul had, it appears, money from several persons to buy grain, and he bought it generally with this money, and afterwards appropriated particular grain, represented

by certain grain tickets, among these persons, according to their respective claims. Such was the learned judge's statement of the result of the evidence.

Five receipts were produced for barley, stored in Bog's warehouse, in McFaul's name, on the 3rd and 4th September.

A receipt was produced, dated 17th August, 1868, signed by McFaul, for \$200 from plaintiff for purchase of grain on his account. McFaul swore plaintiff employed him to buy grain for him, and gave him the money; that he bought grain with it, which he stored with Bog, and these were the receipts produced. The first grain bought with plaintiff's money he sold again by plaintiff's assent, or direction, got the purchase money and bought again. This grain he offered to sell to one Gearing. Plaintiff had told him he might sell it. He bargained with Gearing, but before Gearing paid him, it was seized by the sheriff on a judgment against McFaul.

It appeared from McFaul's evidence that the barley mentioned in the receipts was placed in Bog's warehouse to meet an engagement he had made with Gearing. Gearing sold McFaul, on 3rd September, 500 or 600 bushels of barley, for which McFaul paid him. He thought the price high, and they agreed that McFaul might return the barley again in a day or two, and Gearing would take it back and pay him at the same rate. He commenced putting barley into Bog's store to replace Gearing's quantity, and McFaul's agent brought these barley receipts (360 or 370 bushels) for Gearing to pay the money on and take as so much grain, to be returned to him. This was 5th September. Gearing swore he would have taken and paid for it as soon as McFaul had put it on board, as agreed, if the sheriff had not seized. Gearing swore plaintiff told him McFaul had not bought any barley for him before 21st September.

McFaul was also buying for Diamond and Richardson. He said that on 3rd September he had no money of Diamond's, but he may have had money of Richardson's, and

he had money of plaintiff's. He would not say that all the grain he had at Bog's on September 3rd was plaintiff's. He said he did not distinguish in his books or shipping tickets for whom in particular the grain was, until he appropriated the tickets. He held them generally in his hands for the persons for whom he bought, to be distributed among them, and he did not appropriate them till after the seizure. He thought he made a profit on the sale of plaintiff's grain, which he bought for the \$200, which he had to account for in his bills. He said he did not buy the barley for himself, he bought for plaintiff, or for some other of his principals. After the sheriff had seized, the defendant, as assignee, notified him and claimed all that was seized.

Bog, the warehouseman, swore that he knew no one but McFaul in the matter.

The only question left to the jury was, whether plaintiff had supplied McFaul with money to buy barley before 5th September.

The learned judge reported that "a majority of the jury" answered this question in the affirmative.

A verdict was returned for plaintiff for \$198, the undisputed wheat and rye at Gray's warehouse, and leave was reserved to plaintiff to move to increase the verdict by \$210.66, for the barley at Bog's, if the Court should be of opinion that he was entitled so to do.

The learned judge inclined against plaintiff's right on this.

In Easter Term, 1869, *Fitzgerald* (of Picton) obtained a rule to increase the verdict accordingly, to which, this Term, *C. S. Patterson* shewed cause, citing *Box v. Provincial Insurance Co.*, 15 Grant 337, 552, and *S. Richards*, Q. C., supported the rule.

HAGARTY, C.J.—The plaintiff, to support his case, has of course to shew that defendant has converted or seized some of his actual property. That he gave McFaul money to buy

barley may be assumed. If McFaul with that money did purchase barley for plaintiff, it became plaintiff's property, and the only difficulty would then be that it was mixed with other barley, either of McFaul or some other of his principals. This case goes far beyond our case of last Term, of *Coffee v. Quebec Bank*,* the difficulty as to ownership by plaintiff arising at a much earlier stage. We have to enquire, before any mixture took place, whether any actual property of plaintiff was in existence to be mixed. I cannot gather from McFaul's evidence that after he had sold the first barley, bought with plaintiff's money, to Richardson, he ever bought a bushel of barley professedly or expressly for plaintiff. He says the barley mentioned in the receipts was stored in Bog's warehouse to meet the engagement he had made with Gearing.

The learned judge reports to us that McFaul says he did not buy for plaintiff, nor did he attempt to appropriate any portion of the barley in warehouse till the sheriff had seized. It is not easy, on these facts, to see how any property in any portion of the barley vested in plaintiff. To make it plaintiff's barley while in the warehouse, it must have been there at plaintiff's risk, and if burned, plaintiff, and not McFaul, would be the loser. McFaul would be discharged *pro tanto* as to the money given him to buy grain.

I think the plaintiff fails, that he has shewn no property in any specific barley.

There is an instructive review of the law, as to mixture of property and the rights of the owners, in *South Australian Insurance Co. v. Randall* (L. R. 3 Privy Council App. 101.)

GWYNNE, J.—The rule cannot be made absolute, unless, in the terms of the leave reserved at the trial, we shall be of opinion that upon the evidence the barley stored at Bog's warehouse was the property of the plaintiff. It was admitted, in argument, that unless at the time the barley

* Standing for judgment, in Appeal.

was first delivered to Bog and placed in his warehouse, it was the plaintiff's property, nothing has happened since such delivery which could make it his. Upon the evidence I can see nothing which would justify us in arriving at the conclusion that the barley when stored with Bog was the property of the plaintiff and not of McFaul, by whom and as whose it was in fact stored. The rule must therefore, in my judgment, be discharged.

GALT, J., concurred.

Rule discharged.

ASHFORD V. CHOATE.

Slander of title—Allegation of special damage—Pleading.

In an action for slander of title, the declaration should not only contain an allegation that the words complained of as conveying the slander are false and maliciously uttered, but also an express allegation of some special damage resulting from the slander *actually sustained*, and such special damage must appear upon the face of the declaration to be the mere natural and direct consequence of the words complained of. In this case, therefore, the averment "whereby said M. was prevented from carrying out and completing, and refused to carry out and complete said contract for the purchase of said land from plaintiff, and plaintiff has hitherto lost the sale of said land and the use of the purchase money thereof, and has been unable to sell and dispose of said land, and has incurred and been put to great loss and expense in and about said contract with M., and the enforcement thereof, and in and about quieting the title to said land," was held a sufficient averment of special damage.

The second count of the declaration was for defamation in the use of words not actionable without special damage alleged, and the averment was, "whereby plaintiff lost the friendship, assistance and hospitality of (specifying certain parties) and many others of his neighbours, divers of whom refused and were unwilling, as theretofore, to deal with and transact business with plaintiff, and from whose friendship, hospitality and business dealings plaintiff had derived profit and advantage: *Held*, insufficient.

Declaration, (1st count) that plaintiff, being well and sufficiently seized of an equitable estate in fee simple in and to certain lands in, &c., and subject only to a mortgage thereof, &c., and which said land had been conveyed to plaintiff by defendant, and plaintiff having contracted with one May-

bee for the sale of said lands to him at the price of, &c., defendant falsely and maliciously spoke and published of and concerning plaintiff's title to said lands, to and in the presence of said Maybee, &c., the words following (setting them out); whereby said Maybee was prevented from carrying out and completing, and refused to carry out and complete, said contract for the purchase of said land from plaintiff, and plaintiff had therefore lost the sale of said land and the use of the purchase money thereof, and had been unable to sell and dispose of said land, and had incurred and been put to great loss and expense in and about said contract with Maybee, and the enforcement thereof, and in and about quieting the title to said land, and disproving said false and malicious statements of defendant respecting same, and had otherwise incurred great loss, damage and expense in consequence thereof.

2nd count—That defendant falsely and maliciously spoke and published of and concerning plaintiff the words following, that is to say: "James Ashford (meaning plaintiff) is a great scoundrel: he has robbed me of \$130, meaning thereby that plaintiff had, by fraudulent and dishonest means, deprived defendant of said sum, whereby plaintiff was much injured in his fair name, credit, and reputation, and lost the friendship, assistance, and hospitality of, &c., (setting out the names) and many others of his neighbours, divers of whom refused and were unwilling, as theretofore, to deal with and transact business with plaintiff, and from whose friendship, hospitality, and business dealings plaintiff had derived profit and advantage, and plaintiff otherwise sustained great loss and damage, &c.

Demurrer, (to first count)—No sufficient special damage charged therein; (to second count),—Words, *per se*, not actionable, and no sufficient special damage shown.

J. D. Armour, for the demurrer, cited *Vickars v. Wilcocks* (8 Ea. 1; *Morris v. Langdale*, 2 B. & P. 284; *Pitt v. Donovan*, 1 M. & S. 639; *Collins v. Cave*, 4 H. & N. 225, S. C. 6 H. & N. 131; *Haddon v. Lott*, 24 L. J. C. P.

491; *Cotterell v. Jones*, 11 C. B. 713; *Baker v. Pater*, 3 C. B. 831; *Moore v. Meagher*, 1 Taunt. 39; *Roberts v. Roberts*, 5 B. & S. 384; *Allsopp v. Allsopp*, 5 H. & N. 534.

Hector Cameron, contra, cited *Wren v. Weild*, L. R. 4 Q. B. 730; *Smith v. Spooner*, 3 Taunt. 246; *Brooke v. Rawle*, 4 Ex. 521; *Moore v. Meagher*, *supra*.

GWYNNE, J., delivered the judgment of the Court.

To entitle the plaintiff to recover upon the first count of the declaration, that count must not only contain an allegation that the words complained of, as conveying the slander of title, are false and maliciously uttered, but also an express allegation of some special damage resulting from the slander *actually sustained* by the plaintiff, and such special damage must appear upon the face of the declaration to be the mere natural and direct consequence of the words complained of: *Malachy v. Soper* (3 Bing. N. C. 385); *Haddon v. Lott* (15 C. B. p. 421); *Pitt v. Donovan* (1 M. & S. 639); *Steward v. Young* (L. R. 5 C. P. 127).

The plaintiff complains that, being seised of an equitable estate in fee simple in certain lands, which he had contracted with one Maybee to sell to him for the sum of \$13,000, the defendant falsely and maliciously spoke and published of and concerning the plaintiff's title to the said lands, to and in the presence of Maybee, as follows: "James Ashford's (the plaintiff's) title to the said land is good for nothing: I held the land in trust for John and James Ashford, and James's brothers are coming from California to claim their rights, and any money Maybee pays James Ashford will be lost; the deed which I gave James Ashford is good for nothing: James Ashford's brothers and sisters have as good a right to the land as he has, and my oath will give it to them;" *whereby the said Maybee was prevented from carrying out and completing, and refused to carry out and complete the said contract for the purchase of the said land from the plaintiff, and the plaintiff*

has hitherto lost the sale of the said land and the use of the purchase money thereof, and has been unable to sell and dispose of the said land, and has incurred and been put to great loss and expense in and about the said contract with Maybee and the enforcement thereof, and in and about quieting the title to the said lands, and disproving the said false and malicious statement of the defendant.

The question arising upon the demurrer is, whether the above discloses such a good and sufficient statement of special damage as entitles the plaintiff to recover in respect thereof.

So much of the above as alleges that the plaintiff has been unable to sell and dispose of the said land except to Maybee, and has been put to great loss and expense in and about quieting the title to the said lands, and disproving the said false and malicious statements of the defendant, is in my judgment insufficient to sustain the action. An averment of general inability to sell is insufficient: *Tasburgh v. Day* (Cro. Jac. 484); and I do not think that expense incurred in quieting the title to the land can be said to be a damage, which is the mere natural and direct consequence of the words complained of. But it remains to be considered whether the averment that, by reason of the words complained of, "Maybee was prevented from carrying out and completing, and refused to carry out and complete, the said contract for the purchase of the said land from the plaintiff, and the plaintiff has hitherto lost the sale of the said land and the use of the purchase money thereof, and has incurred and been put to great loss and expense in and about the said contract with Maybee and the enforcement thereof," is sufficient.

For the defendant it was urged that the count was insufficient, upon the authority of *Vicars v. Wilcocks* (8 East, and 2 *Smith's Leading Cases*) and *Morris v. Langdale* (2 Bos. & Pul. 284).

Vicars v. Wilcocks was an action for personal defamation, with special damage. The plaintiff declared that

whereas he was retained and employed by J. V. as a journeyman, for wages, the defendant, knowing the premises, and maliciously intending to injure him, and to cause it to be believed by J. V. and others that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of J. V., and to cause him to be dismissed therefrom, and to impoverish him, in a discourse with one *J. M. and with divers other persons* concerning the plaintiff, and concerning certain flocking cord of the defendant's, alleged to have been before then cut, said that it was William Vicars, the plaintiff, who had cut the cord; by reason whereof, J. O., believing the plaintiff to have been guilty of unlawfully cutting the said cord, discharged him from his service and employment, and has always since refused to employ him; and it was held that the plaintiff could not recover in respect of such alleged damage.

Morris v. Langdale (2 Bos. & Pul. 284) was also an action for defamation in saying of the plaintiff, who was a jobber or dealer in the public funds, "he is a lame duck," meaning that he had not fulfilled his contracts in respect of such funds, in consequence of which divers persons refused to fulfil their contracts with him, specifying the contracts, and he was prevented from fulfilling his contracts with other persons. It was held that it did not sufficiently appear in the declaration that the words were spoken of lawful contracts, and that the declaration was therefore bad. Lord Eldon, giving judgment in that case, says: "A great part of the special damage consists in an allegation that other persons did not perform their lawful contracts with him. Now, if the plaintiff has sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the plaintiff against those persons, and the law supposes that in such actions the plaintiff would receive a full indemnity.

In *Green v. Button* (2 C. M. & R. 707) the plaintiff

declared that he had purchased of Cesser & Son, who then sold to the plaintiff 200 spruce battens, at and for £11, paid by the plaintiff to Cesser & Son, that plaintiff had borrowed the £11 from defendant, and defendant falsely, maliciously, and to injure defendant, set up a claim of lien on the battens for the £11, and claiming such lien forbid Cesser & Son to deliver them to plaintiff, and that they accordingly refused to deliver them, whereby he was prevented from using them in his business. Wightman, arguing there for the plaintiff, distinguished the case from *Vicars v. Wilcocks*, because *there* there was no necessary connection between the slander uttered by the defendant and the wrongful act of the party who was supposed to have been induced by it to dismiss the plaintiff from his service. "It is true," he argues, "that the plaintiff might have a ground of action against Cesser & Son, but that is no defence here. In cases of slander of title, though there is an action against the party who fails to perform his contract, there is an action also against the author of the slander," citing *Bac. Abr., Action on the Case (B.)* where it is said, "If one slanders my title, whereby I am wrongfully disturbed in my possession, though I have a remedy against the trespasser, yet I may have an action against him that caused the disturbance"; and he likened the case of *Green v. Button* to a case of slander of title. He says: "Here it is admitted on the pleadings that the plaintiff has been unable to obtain his goods from Cesser & Son by reason of the defendant's unfounded representation of a lien, and forbidding them to deliver them. *It is like a case of slander of title*, where it is necessary to shew that the defendant had good grounds for saying what he did." Parke, B., giving judgment, says: "In considering the effect of this demurrer, we must lay out of the question the averment in the declaration of payment of the price. Then the second question is, whether the averment of special damage is sufficiently connected with the alleged wrongful act. It seems to me that there is a sufficient allegation that the false representation was the cause of

the non-delivery of the goods by Cesser & Son. But it is said they were under an absolute contract to deliver to the plaintiff, and that he might take his remedy against them for the breach of that contract, and *Vicars v. Wilcocks* and Lord Eldon's *dictum* in *Morris v. Langdale* are cited to shew that the plaintiff's right of action against them bars him from recovering against the defendant. It is unnecessary to consider how far those cases would be supported if the same question arose directly. If it did, we should desire time to give them a full consideration, some doubt having been thrown upon their authority, but in order to raise that question we must import into the declaration an allegation that Cesser & Son were under an absolute obligation to deliver, whereas the averment of payment being struck out, it only appears that the goods were sold on credit, and not paid for. The result is, that the defendant had no reasonable or probable cause for his representation, and that there was a damage to the plaintiff resulting therefrom in the non-delivery of the goods."

The work referred to by Parke, B., as having cast doubt upon the authority of *Vicars v. Wilcocks*, and upon the dictum of Lord Eldon in *Morris v. Langdale*, is Mr. Starkie's work on the law of Slander and Libel, in the 2nd edition of which, p. 205, he observes: "It has been said that where in consequence of the words a third person has refused to perform a contract previously made with the plaintiff, and which in law he is bound to perform, no action is maintainable, for the plaintiff is in such case entitled to compensation for the non-performance of the contract, and were he allowed to maintain his action for the slander, he would receive a double compensation for the same injury; first, against the author of the slander, and secondly, against the person who had refused to perform his contract: this doctrine would in many instances be productive of hardship to the plaintiff. He may resort, it is true, to his legal remedy against the person refusing to perform his contract; but this can scarcely be considered

as full and real compensation to a party who has a benefit in possession wrested from him and converted into a bare legal right."

In the editions of *Smith's Leading Cases*, edited by Messrs., now Justices, Keating and Willes, in the Notes to *Vicars v. Wilcocks*, it is suggested that the case was decided not so much on the ground that the plaintiff, if suffered to recover, would have obtained two compensations, as on the ground that in reason and common sense there was no connection between the imputation levelled at the plaintiff and the damage said to have been the result of it, any more than in *Kelly v. Partington* (5 B. & Ad. 645) the rejection of the plaintiff as a servant could be considered the natural consequence of the words spoken of her by the defendant. It is further added that the decision in *Vicars v. Wilcocks* is sustainable on the ground taken by the Court in *Ward v. Weekes* (7 Bing.), namely, that the imputation was not uttered in a discourse with J. O., but in a discourse with third persons who were free agents, and had not these third persons repeated it, the mischief never would have ensued. The judgment, however, of Lord Ellenborough in *Vicars v. Wilcocks*, and the dictum of Lord Eldon in *Morris v. Langdale* (for the decision in the latter case is unaffected by the dictum) underwent much discussion in *Lumley v. Gye* (2 El. & Bl. 216), which resulted in their judicial disapproval.

In *Lumley v. Gye* the question was whether an action will lie by the proprietor of a theatre against a person who mischievously procures the entire abandonment of a contract to perform at a theatre, whereby damage was sustained.

For the defendant it was contended, upon the authority of the above cases, that the action would not lie, for that the plaintiff had a complete remedy against the performer who had violated her contract, in an action upon the contract. Willes, who argued for the plaintiff in that case, to distinguish it from *Green v. Button*, says, "The act complained of in *Green v. Button* was a wrong in itself: the

injury done was analogous to a slander of title." Now this language seems to convey an admission that a case of slander of title stands upon a different principle than *Vicars v. Wilcocks*; for the reason that, as I presume, there can be no doubt that there is an intimate connection in reason and common sense between the imputation that the plaintiff has no title to the land contracted by him to be sold and the refusal for that reason by the intending purchaser to complete the contract. In *Lumley v. Gye* Crompton, J., giving judgment says: "In deciding on the narrower ground I wish by no means to be considered as deciding that the larger ground taken by Mr. Cowling is not tenable, or as saying that in no case, except that of master and servant, is an action maintainable for *maliciously* inducing another to break a contract to the injury of the person with whom such contract has been made."

Now the *larger ground* here referred to as taken by Mr. Cowling was thus taken, in his argument: "Blackstone (3 Bl. Com. 132) treats the action by a master as *an example* of a *general rule* that inducing a breach of contract is an injury for which an action lies; and surely any one not a lawyer would agree that the malicious and intentional procurement of a breach of contract was a wrong, and that the breach of contract intended to be procured was the direct consequence of that wrongful procurement. *Green v. Button* is apparently an authority for that larger proposition, and so is *Sheperd v. Wakeman* (1 Sid. 79)." Crompton, J., proceeds thus: "It does not appear to me to be a sound answer to say that the act in such cases is the act of the person who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer to say that there is a remedy against the contractor, and that the party relies on the contract, for besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrong-doer may be for a different matter, and the *damages occasioned by such malicious injury* might be calculated on a very different principle

from the amount of the debt which might be the only sum recoverable on the contract." Erle, J., says: "It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong. He who procures the wrong is a wrongdoer and may be sued either alone or jointly with the agent in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is *upon* the contract *against the contracting party*, and if he is made to indemnify for such breach thereof, no further recourse is allowed; and, as in the case of the procurement of a breach of contract, the action is for a wrong, and cannot be joined with an action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the action for this wrong, in respect of other contracts than those of hiring, are not numerous, but still they seem to me sufficient to shew that the principle has been recognised. In *Green v. Button* it was decided that the procuring of a breach of a contract for sale of goods was an actionable wrong. *Shepherd v. Wakeman* (1 Sid. 79) is to the same effect, where the defendant procured a breach of contract of marriage by asserting that the woman was already married. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measure of damages is restricted, or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed; but the measure of damages against the debtor is interest only; or in the case of non-delivery of goods, the disappointment may lead to a heavy forfeiture under a contract to complete work within a time, but the measure

of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases he who procures the damage maliciously might justly be responsible *beyond the liability of the contractor*;" and Wightman, J., who was counsel for the plaintiff in *Green v. Button*, says: "It is contended that the damnum is neither the natural nor the legal consequence of the injuria, and that consequently the action is not maintainable, as the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant; and the case of *Vicars v. Wilcocks*, which, though it has been much brought into question, has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present, on the ground suggested by Lord Tindal, C. J., in *Ward v. Weeks* (7 Bing. 211), that the damage in that case as well as in *Vicars v. Wilcocks* was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorized communications made by those to whom the words were uttered by the defendants. The distinction is taken in *Green v. Button*, in which it was held that an action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff by asserting that he had a lien upon them, and ordering these persons to retain the goods until further orders from him. It was urged for the defendant, in that case, that as the persons, in whose custody the goods were, were under no legal obligation to obey the orders of the defendant, it was the mere spontaneous act of those persons which occasioned the damage to the plaintiff; but the court held the action to be maintainable, though the defendant made the claim as of right, he having done so maliciously and without any reasonable cause, and the damage accruing thereby. It was undoubtedly, *primâ facie*, an unlawful act on the

part of Miss Wagner to break the contract, and therefore a tortious act of the defendant maliciously to procure her to do so, and if damage to the plaintiff followed in consequence of that tortious act, it would seem, upon the authority of *Green v. Button*, and *Winshure v. Greenbach* (Willes 577), as well as upon general principle, that an action in the case is maintainable. A doubt was expressed by Lord Eldon in *Morris v. Langdale*, whether in an action on the case for slander the plaintiff could succeed upon an allegation of special damage, that by reason of the speaking of the words other persons refused to perform their contracts with him, Lord Eldon observing that that was a damage which might be compensated in actions by the plaintiffs against such persons. It has, however, been remarked with much force by Mr. Starkie, in his treatise on the Law of Libel, that such a doctrine would be productive of much hardship in many cases, as a mere right of action for damages for non-performance of a contract can hardly be considered a full compensation to a person who has lost the immediate benefit of the performance of it. The doubt indeed is hardly sustainable on principle; and there are many cases in which actions have been maintained for slanderous words, not in themselves actionable, on the ground of the speaking of the words having induced other persons to act wrongfully towards the plaintiff, as in the case of *Newman v. Zachary* (Ayleyn 3), where an action on the case was held to be maintainable for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized. Upon the whole, therefore, I am of opinion that, upon general principles upon which actions on the case are founded, as well as upon authority, the present action is maintainable."

In the notes to *Vicars v. Wilcocks* (2 Smith's Leading Cases) it is said that the law laid down there cannot be easily reconciled with the cases of *Rex v. Moore* (3 B. & C. 184) and *Rex v. Carlisle* (6 C. & P. 636), in the first of which cases a defendant, who had a shooting ground near a public highway, was held to be liable for unlawfully causing

persons armed with firearms to assemble outside to fire at stray pigeons ; and in the second case a defendant was held to be indictable for a nuisance for exhibiting effigies in his windows, *thereby attracting a crowd and causing a foot-way to be interrupted*, although the effigies might not be libellous. In the note to the 2nd edition of Mr. Starkie's work, a portion of which is incorporated into the text of the 3rd edition recently published, p. 326, this further reason is given why, notwithstanding the breach of the contract and the cause of action thereby accruing, an action should also lie against the publisher of the slander." Besides this the plaintiff may have been put to great trouble and to some expense, in respect of which he could not obtain any compensation in an action for the breach of contract. The damage immediately occasioned by the slander, that is, the loss of character, *and the loss of the immediate benefit of his contract and the trouble and extra expense* to which he must be put to obtain compensation for the breach of contract, is distinguishable from the damage arising from the breach of contract."

I have read lately of a case of a contract having been entered into in England by a person with a solicitor for the sale to him of a small piece of land, at and for the sum of £200. The solicitor having ascertained that the title, although good, was such that the expense of furnishing an abstract would much exceed the purchase money agreed upon, demanded that an abstract should be furnished, and the vendor, upon learning the expense which would attend its being furnished, accepted terms of accommodation liberally offered to him by the solicitor, namely, that the latter would accept a conveyance of the land without paying anything, and would dispense with the abstract.

Now, suppose the person with whom such a contract had been made, instead of being a solicitor, had been perfectly willing to take the vendor's title as it was, and so that the contract would have been completed and the purchase money paid without the production of an abstract, and that to prevent this result a stranger had falsely and maliciously stated

to the vendee that the vendor had no title whatever, and thus occasioned the vendee to demand an abstract, which the vendor could not furnish without incurring a great, and but for such malicious conduct, unnecessary expense; can there, in common sense or justice, be any reason why the vendor so damnified should not recover the amount of his damage from the person whose false and malicious act had caused the damage? I think not, and I think there are many expenses incurred by a vendor, in enforcing a contract, which he cannot recover against the vendee, which he should in justice be permitted to recover from a wrong-doer, who by his false and malicious slander has caused the breach of contract, if but for that slander the contract would not have been broken and those expenses would not have been incurred. *Cotterell v. Jones*, 11 C. B. 713, which has been relied upon, is not, in my judgment, a decision adverse to this view. In that case it was admitted that in an action against two persons, claiming to have an interest in the subject matter of a suit, for conspiring maliciously and vexatiously, and without reasonable cause, to commence and commencing an action against the plaintiff in the name of a third person, for their own benefit, in which action the plaintiff was nonsuited, the plaintiff could not recover costs ultra the costs given by the statute 23 Hen. VIII., ch. 15, sec. 1, to a successful defendant—that such costs could no more be recovered against the defendants, who had sued in the name of the original plaintiff, than they could have been recovered against the original plaintiff himself, who had been nonsuited in the action.

Now, *Pitt v. Donovan* (1 M. & S. 639) came up before Lord Ellenborough, in 1813, seven years after his own judgment in *Vicars v. Wilcocks*, and thirteen years after the judgment of Lord Eldon in *Morris v. Langdale*. It was an action of slander of title like this, and, like this, a contract had been entered into by the plaintiff for the sale of the land. The declaration alleged that the plaintiff had contracted with one Barton for the sale to him of

the land for £30,000, and that Barton was willing to accept the title of the plaintiff and to complete the contract, but that the defendant, knowing the premises, but unlawfully and maliciously desiring to scandalize the right and title of the plaintiff, and to hinder and prejudice him in the sale, and to deter and prevent Barton from completing the contract, wrote and published to Barton certain false, scandalous, and malicious libels of and concerning the right and title of the plaintiff to the land, that is to say, &c., &c. Now if it was considered that a case of slander of title was governed by *Vicars v. Wilcocks* and *Morris v. Langdale*, it is singular that neither Lord Ellenborough nor counsel ever referred to those cases in the course of the deliberate argument and judgment which *Pitt v. Donovan* underwent. Their not being so cited or alluded to leads, in my judgment, to the conclusion that there was no doubt ever entertained that it is an actionable wrong for a person falsely and maliciously to slander the title of a plaintiff to lands contracted by him to be sold, and so to impede or prevent the sale, or to expose the party to extra expenses, which otherwise would not have been incurred, in proceeding upon the breach of the contract, and that for such actionable wrong the plaintiff is entitled to recover such damages as he can shew have been sustained by him resulting from the wrong complained of. It was contended, on the argument, that we must read the declaration as alleging that the plaintiff has obtained an enforcement of the contract. Even though we should be so obliged to read the declaration, still I am of opinion that the action lies, notwithstanding the objection that there was a contract enforceable and enforced, for, as I have said, I am of opinion that a slanderer of title may be liable to indemnify the plaintiff for expenses which but for the slander would *not have been* incurred, and which were not recoverable in an action on the contract. However, I do not think the declaration is fairly open to the construction suggested. The plaintiff declares that, by reason of the wrong complained of, Maybee was prevented from carrying out and

completing, and refused to carry out or to complete, the said contract, *and the plaintiff has hitherto lost the sale thereof, and the use of the purchase money thereof.* Consistently with this allegation the contract cannot have been fulfilled either voluntarily or by *enforcement*. "And has been unable to sell and dispose of the said land," (this must be read as "to Maybee," who, having a contract, is the only person to whom, under the circumstances, the plaintiff could have sold), "and has incurred and been put to great loss and expense in and about the contract with Maybee, and the enforcement thereof." This, consistently with what precedes, must be read as "in and about proceedings taken for the enforcement of the contract." Looking at this case, as we must, as a mere matter of pleading, I think that, upon principle and authority, the first count is sufficient in law, and that the plaintiff is entitled to our judgment upon the demurrer thereto. Whether or not the plaintiff has sustained damage resulting from the wrong complained of, independently of that recoverable in an action on the contract, is a matter which must depend upon the evidence to be adduced.

The second count is also demurred to. That is a count for defamation, in the use of words not actionable without special damage alleged. The special damage is thus alleged, "whereby the plaintiff lost the friendship, assistance and hospitality of J. L., J. M., T. H., and many others of his neighbours, divers of whom refused, and were unwilling, as theretofore, to deal with and transact business with the plaintiff, and from whose friendship, hospitality, and business dealings, the plaintiff had derived profit and advantage."

This allegation of special damage is, in my judgment, for many reasons, wholly insufficient. It would be quite insupportable without naming J. L., J. M., and T. H., and yet they are so joined with "many others of his neighbours, *divers* of whom refused to deal and transact business with plaintiff, as theretofore," as to leave it in doubt whether it is intended to be alleged that J. L.,

J. M., T. H., or any of them, were some or one of those so refusing. Then what is meant by refusing "to deal and transact business with plaintiff" is not apparent; for the action is not brought for injury to the plaintiff in any trade or business, nor is it averred that he is engaged in any such; so that in so far as business dealings are concerned, there was none such alleged to have existed. Then it remains that the plaintiff has lost the friendship and hospitality of D. L., J. M., and T. H., and many others from whose friendship and hospitality he had derived profit and advantage. How the loss of friendship is to be pecuniarily estimated I do not well see; nor is it sufficiently alleged what the pecuniary interest was which the plaintiff had in the hospitality of his friends which he has lost. For all that appears, the profit and advantage which the plaintiff had derived from the enjoyment of the friendship and hospitality of his associates was that mental profit and advantage which the society and hospitality of well informed persons brings to kindred minds who are capable of enjoying the conversation of such persons.

The demurrer to the second count must be allowed.

*Judgment for plaintiff on first count, and
for defendant on second count.*

SCHAEFER AND WIFE V. LUNDY.

Sale for taxes—Irregularity.

The warrant, on a sale for taxes, contained two different entries of the same lot for taxes due for two successive years. The sheriff sold the lot for the first year's taxes, then adjourned the sale in consequence of other lots remaining unsold, and at a subsequent date sold the same lot, for the second year's taxes, to another party:

Held, that the warrant was wrong in entering the same lot twice, as if two separate properties, and that the sale was void; the first, because the sheriff did not sell for all the taxes appearing to be due; the second, because, having previously, at the same sale, and under the same warrant, sold the land to one, he could not sell it again to another.

THIS was an action of ejectment, tried before Wilson, J., at Welland, both parties claiming under Sheriff's sales for taxes.

The case was tried on admissions, from which it appeared that the taxes were due, and all preliminary proceedings were correct ; but the warrant contained two entries of taxes due on the same lot. It was in this form :

DESCRIPTION.	YEARS DUE.	AMOUNT.	TAXED IN NAME OF
Block C. C., Lot 6.	1858.	6 17	Robert Ham.

A few lots then followed, and it is thus continued :

C. C., Lot 6, 1-5th acre	1859.	\$5 62	A. Fleming.
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The sale commenced on 4th February, 1867, on which day the lot was sold to the plaintiff for the taxes due for 1858 ; but, some of the lots remaining unsold, among which was this same lot for the taxes due for 1859, the sale was adjourned until the 5th March 1867, when the lot in question was sold over again to the defendant.

A verdict was entered for the defendant, with leave to the plaintiff to move to enter it for him.

Harrison, Q.C., obtained a rule accordingly, and *James Miller* shewed cause, citing *Hall v. Hill*, 22 U. C. 578.

Harrison, contra, cited *Doe Stata v. Smith*, 9 U. C. 658 ; *Allan v. Fisher*, 13 C. P. 63 ; *Mills v. McKay*, 15 Grant, 192.

GALT, J., delivered the judgment of the Court.

We find it impossible to uphold these sales, or either of them. The sheriff did not pursue his warrant, although it was not owing to his mistake. He should, at the first sale, have sold not only for the taxes due for 1858, but also for those for 1859, both appearing on the face of the warrant as overdue. The warrant was wrong in entering the same lot twice, as if there were two separate properties. *Mills v. McKay* (15 Grant) was cited as an authority for uphold-

ing the first sale, but that case is very distinguishable from the one now before us. In 1865 a sale for taxes took place for arrears extending from 1859 to 1865, and in 1866 another sale of the land in dispute took place for the taxes for 1858, which had been overlooked at the time of first sale. The learned Vice-Chancellor there held that the first sale must prevail, on the ground that he did not think the Legislature intended to allow municipal corporations to make successive sales for parts of the taxes in arrear at one time ; but in the case before us the sheriff did not, at the first sale, sell for all the taxes due on the lot, as stated in his warrant, but only for a portion thereof, and then, at an adjourned period of that sale, sold the same lot to the defendant. In short, we think that the first sale was void, because the sheriff did not sell for all the taxes appearing on the face of his warrant to be due ; and we think the second sale void, because, having previously, at the same sale, and under the same warrant, sold the land to the plaintiff, he could not sell it again to the defendant.

It is unnecessary to particularize the curious and absurd consequences that must follow from legalizing such a course as was here pursued, viz., as to redemption within the year, and the qualified right in the purchaser during that year, and as to the subsequently accrued taxes.

Rule discharged.

REGINA v. THE LAW SOCIETY.

Repairs to Osgoode Hall—Liability for.

In the year 1846 the Law Society of Upper Canada entered into a covenant with the Crown, in conformity with 9 Vic., ch. 33, to provide, at their own cost, and without further charge to the province, for all time to come, fit and proper accommodation for the Superior Courts of Law and Equity for Upper Canada, as then existing or thereafter to be constituted; and in default, or in case of the buildings becoming dilapidated, &c., the Crown to repair, &c., and the outlay to become a charge on the Society's land. On the execution of this covenant, the sum of £6,000 was paid over to the Society by the Government, and proper accommodation was provided by the former for the then existing Courts. Subsequently the Court of Common Pleas was established, and it became necessary to enlarge the buildings in which the Courts were held at a greatly enhanced outlay. The 18 Vic., ch. 122, 20 Vic., ch. 64, 22 Vic., ch. 31, and C. S. U. C. ch. 33, were passed for raising funds for the purpose; and the moneys authorized thereby were expended in the erection of Osgoode Hall, for the accommodation of the Courts. In 1865, at the request of the Society, a certain sum was supplied by the government for necessary repairs to the building, and by subsequent arrangement with the Ontario Government, the latter agreed to pay the Society annually the sum of \$3,000 for the purposes of heat and light:

Held, per Hagarty, C. J., that notwithstanding the greatly increased expense, since the passage of the above Acts, of repairing and maintaining the buildings, the Society was nevertheless bound by its covenant to repair and maintain them, and was not impliedly, much less expressly, released therefrom in consequence of the legislation that had taken place in relation thereto.

Per Galt, J., that the effect of 33 Vic., ch. 9 (Ont.) was to entitle the Law Society to have the Government account to them annually for the sum of \$29,000, and that this sum must be considered as a provision to enable them to perform their covenant, and that consequently the same was in full force.

Per Gwynne, J., that the effect of subsequent legislation had been to discharge the Society from their covenant.

SPECIAL CASE.

By 9 Vic., ch. 33, it was provided that the sum of £6,000 should be raised by debentures, to enable Her Majesty to pay that sum to the Law Society, so soon as that Society should enter into a covenant to provide fit and proper accommodation for the Superior Courts of Law and Equity, for all time to come, at the seat of the said Society, without further charge and expense to the Province. A tax on law

proceedings was thereby provided, to pay off interest and principal of the debentures, and two acres of Crown land were directed to be sold for a similar purpose.

On 20th June, 1846, the Law Society executed a deed of covenant, reciting the foregoing statute, and that the Society, in pursuance of arrangements made with the Government, had provided proper accommodation for the Superior Courts of Law and Equity, and such Courts were then held in the buildings so provided, and that Government had agreed to pay the £6,000 on the conditions aforesaid. Then the Society covenanted with the Queen and her successors, in consideration thereof, and under the said Act, that they would at all times thereafter, at their own costs and charges, and without further charge and expense to the Province, provide fit and proper accommodation for the Superior Courts of Law and Equity for Upper Canada, as then existing or thereafter to be lawfully constituted, for all time to come, according to the meaning of the Legislature: in default of their so doing, or if the buildings should be allowed to become dilapidated or out of repair, or unfit or inconvenient for the Courts, &c., &c., then the Crown might make all needful repairs, or provide other buildings, and all moneys so expended should become a charge on the lands of the Society, and be recoverable as Crown debts.

18 Vic., ch. 122, recited the last-mentioned statute and the covenant of the Society; that the Society had petitioned, in 1852, that they had had to make certain necessary improvements, and expended a much larger sum than was originally intended, and that they were in debt £4,000; and it was then recited that since the covenant the Legislature had increased the number of the Superior Courts, rendering further expenditure necessary, and that it was expedient to assist the Law Society to discharge said debt, and it was expedient to provide increased accommodation for the Courts, and in order to accomplish the same it was necessary *to extend and continue the provisions of the said recited Act*, until the debt of the Law Society and

all costs of the further alterations and accommodation should be discharged. It then authorized the issue of £10,000 debentures, and provided a tax on law proceedings to pay off the principal and interest.

Chapter 64 of 20 Vic. recited that the sum already granted for the erection of buildings for the Courts, under 18 Vic., ch. 122, was insufficient for the purpose. It then directed the issue of debentures for £10,000, and provided a tax on law proceedings for payment of principal and interest, and that all the provisions of 9 Vic., ch. 33, relating to the debentures, and all matters relating to said debentures, and to the money thereby authorized, should apply as if this £10,000 had formed part of the money to be raised under the said Act. This last provision was also in the 18 Vic., ch. 122, and the name of the Law Society did not occur in this Act.

22 Vic., ch. 31 (May, 1859), recited that it had been found that the moneys granted by 18 Vic., ch. 122, and 20 Vic., ch. 64, for the erection of buildings suitable for the accommodation of the Courts, were insufficient, and that it was necessary to grant additional aid therefor, and to increase the fee fund to liquidate the debt incurred, it authorized the issue of £30,000 of debentures, over and above the moneys authorized by these Acts, and the 9 Vic., ch. 33, and levying a tax to pay off the same on a tariff substituted in lieu of the charges under 20 Vic. and 9 Vic., and the like clause as to the debentures, and matters relating thereto, and to the sums to be raised, as if it had formed part of the sums raised under 9 Vic.

Then the Consol. Stat. U. C., ch. 33, regulated the Law Society, and sec. 6 recited the covenant of the Law Society, and that, to carry out the arrangement, four several sums of money were by four several statutes, 9 Vic., 18 Vic., 20 Vic., and 22 Vic., and that debentures had been issued in pursuance thereof, and that by said Acts provision was made to pay principal and interest, and that it was expedient to continue such provisions for the purpose of liquidating the debts so incurred; therefore, to pay interest

and principal, there was a tariff of charges on law proceedings set out at length, to be accounted for to the Government by the clerks of the Courts, &c. Then it re-enacted the clause as to the two acres of Crown land, as in 9 Vic., ch. 33.

It was admitted by the case stated that the Court of Common Pleas was established in 1849; that all the moneys mentioned as raised were expended under the supervision and management of the Law Society, in the erection of Osgoode Hall, for the accommodation of the Courts, on the Law Society's lands, held by them in fee simple; that in 1865, at the request of the Law Society, a sum of \$2,000 was paid to them by the Government for repairs to the roof and drainage, immediately required, to prevent the necessity of an increased expenditure, a balance of account beyond that sum appearing to the credit of the moneys raised to meet the debentures.

By an agreement made between the Government of Ontario and the Law Society, 6th November, 1867, the Society, in consideration of \$3,000, to be paid annually, covenanted to heat and light the buildings, and to bear all expenses connected with the maintenance of the apparatus thereof.

The question for the opinion of the Court was, whether the Law Society, either in law or in equity, since the passage of the Acts, and under all the circumstances, was or was not liable under the covenant of 1846.

C. Robinson, Q.C., appeared for the Crown, and *J. H. Cameron*, Q.C., and *Anderson*, for the Law Society, citing *Taylor v. Manners*, L. R., 1 Chan. App. 48; *Yeomans v. Williams*, L. R., 1 Eq. 184.

HAGARTY, C. J.—When we are asked to decide as to whether the Society's liability exists either in law or in equity, I assume that, strictly, as a Court of law, we could only consider whether, if there be no defence at law,

the facts would warrant the interposition of a Court of equity on such a case as could be set out in an equitable plea. Beyond this we could hardly venture without assuming the position of referees.

In the view I take of the case it may be unnecessary to consider this point further.

The original liability of the Society, to provide proper accommodation for all time to come, is fully admitted, and this admission of course involves the maintenance and repair. The subsequent legislation is relied on as releasing this liability.

It is important to consider whether any of this legislation can be looked on as having been forced upon the Society, or even as having been enacted without their full concurrence. The perusal of these Acts, and the admitted facts, as to the Society having had the superintendence and management of the expenditure of all the moneys raised from time to time, raise in my mind the strong presumption that all that has taken place from the passing of the Act of 1846 was in full accord between the Government and the Society. But the learned counsel for the Society argue that it is impossible to regard the vast enlargement of the modest plan, considered sufficient in 1846, to the dimensions of 1859, as consistent with the maintenance of this liability.

It is beyond question that an undertaking to repair and maintain buildings which cost £6,000 may become onerous, beyond any possible contemplation of the contracting parties, when it is sought to be applied to buildings costing £50,000 or £60,000. I am unable, however, to follow the reasoning of the counsel that the subsequent legislation deals with the subject in a manner so inconsistent with the retention of the original liability as to work its discharge.

The last act of legislation is contained in the Consol. Act, ch. 33. I cannot read this without the strong conviction that the Legislature treats the covenant of 1846 as still a binding obligation "for all time to come." It

declares that all the moneys raised under the four statutes were, "for the purpose of carrying out the said arrangement," *i.e.*, the arrangement just recited, of 1846, and repeats the old authority to sell some land to help to pay off the debentures.

I do not attach any undue importance to a recital in a statute as conclusive proof of a fact: see *McCallum v. Buffalo and Lake Huron Railway Co.*, 19 C. P. 117: it becomes important when we are discussing intentions.

It is quite true that when the sums of money, beyond the £6,000, were successively granted, no mention was made in any of the Acts of making the landed estate of the Society chargeable therewith; but the original Act contains no such provision: it is the covenant that provides for making the estate liable for any expenditure by the Crown in making repairs or providing other buildings. If the covenant be still binding, this provision must necessarily extend to all the new or improved buildings.

It is clear that the burden on the Society is increased nearly ten-fold, if the covenant still hold: that alone cannot, in my judgment, defeat its operation.

What I fail to see is, that anything was, as it were, forced upon the Society, or that they were compelled to continue under this unreasonable burden.

The first Act of 18 Vic. was passed, it would seem, on the petition of the Society for further aid. There the covenant is expressly referred to, and the £10,000 then granted was, in my judgment, expressly brought under the arrangement of 1846, and the liability continued.

The Act of 20 Vic., ch. 64, does not mention the Law Society by name, but refers to the last-mentioned Acts, and grants a further sum as an additional aid for the same purpose, with like provisions for interest and principal, and the new grant was to be as if raised under the provisions of the Act of 1846.

The Act of 22 Vic., ch. 31, granting further aid, has the same reference, and is almost in the same words as the 18 Vic., and the final £30,000 is to be as if it formed part of

the sum raised by the Act of 1846. Then the Consolidated Act recites the covenant and all the preceding legislation.

The Ontario Act (33 Vic. ch. 9) abolishes all distinction between the various law fees and trust funds under the various statutes, and declares that all should form part of the Consolidated Fund, and that in lieu of the Law Society fees mentioned in the preceding part of the Act a semi-annual sum of \$14,500 should be accounted for to the Law Society by the Ontario Government. I am not called on to declare the effect of this Act, involving as it may some serious questions. It is sufficient for me to say that it does not affect the conclusion at which I have arrived. If its effect be largely to increase the revenues of the Society, it cannot help, at all events, to relieve the liability now in question.

I repeat that I see no ground for declaring this covenant no longer in force.

It seems (as suggested by Mr. Robinson) to be in this way: A. wants certain accommodation on B.'s land, and on paying B. £4000, the latter agrees to find him all the accommodation he may require for ever, and always to maintain it in good order. A. afterwards wants more, and gives B. £10,000 more to increase the accommodation. B. accepts it and doubles the size of the buildings. This operation is repeated twice again; nothing is said as to any increased burden on B., but the latter soon finds that he has a ten-fold heavier expenditure in keeping up the increased buildings than he first contemplated; yet I hardly see how he can obtain relief at law or in equity.

If it be asked why should the Society have to bear the cost of repairing a building worth £60,000 without some corresponding benefit, it might perhaps be said that the same question might have been put as to the agreeing to bear it as to the original expenditure of £6,000: it would only be a question of degree. There was no more apparent reason for their keeping up an inexpensive building for the Courts in 1846 than in 1859, or now in 1870, except that one was much lighter than the other.

As far as direct benefit to the Society is concerned, I see no more consideration for their doing it in one case than in other.

The argument, I think, fails as to the point of consideration. They get nothing apparently for the contract of 1846 of direct benefit to themselves, and they equally get nothing for the increased expenditure and the consequent increased liability. I do not think the grant of the sum for repair of the roof can alter the relative legal position of the parties.

I can understand the Law Society having a very strong claim on the consideration of the Government and the Legislature, based on the altered position of things since 1846, and the existence of a most formidable liability, for which for some reason or other no adequate provision had been made, and which very possibly neither they nor the Legislature ever regarded as likely to assume such very large proportions. The case which they could establish might be such as would probably be considered sufficient to insure their relief.

The Court of Error and Appeal, in *township of Norwich v. Attorney General* (2 E. & A. 504), had to consider the distinction between an equity arising against the Crown, as the executive power in dealing with its debtors, and against the Legislative powers of the three estates speaking through an Act of Parliament. I find there, in a judgment delivered by me, these words, "The only question open to the Court would be, as it seems to me, whether the Legislature have, by its express declaration, or by necessary intendment, according to the rules for construing statutes, put an end to this liability."

I have considered the rule of construction of statutes laid down in some important cases, viz., in the elaborate judgment of Sir J. Turner, L. J., (6 D. M. & G. 1), in which, he cites, with much approval, the rule laid down in *Plowden*, (this case is commented on in *Hervey v. Pridham*, 11 C. P. 342); also the language of Blackburn, J., in *Regina v. Lord Mayor of London* (L. R. 2 Q. B. 292).

When the question is, have the Legislature, by necessary implication and intendment, though not in words, released the Law Society from their obligation by the Acts passed up to and including 1858, when all the money had been provided, I must confess to a deficiency in judicial courage to answer in the affirmative, with the last Act of the same Legislature lying before me, declaring, in 1859, that this obligation had been entered into and that all the preceding Acts had been passed for the purpose of carrying out that arrangement.

I think the Crown is entitled to our judgment.

GWYNNE, J.—By an Act passed in the 9th year of Her Majesty's reign, ch. 33, entitled, "An Act to provide for the accommodation of the Courts of Superior Jurisdiction in Upper Canada," after reciting that it was necessary to make provision for the due accommodation of the Superior Courts of Law and Equity in Upper Canada, it was enacted that there be granted to Her Majesty the sum of £6,000, to be raised by debentures in manner thereafter mentioned, to enable Her Majesty to pay that sum to the Law Society of Upper Canada, so soon as that Society shall enter into a covenant, to the satisfaction of the Governor in Council, to provide fit and proper accommodation for the Superior Courts of Law and Equity, for all time to come, at the seat of the Society, without further charge and expense to the Province. The Act then provided that the debentures should be issued at a rate of interest not exceeding six per cent. per annum, and redeemable within fifteen years. It declared the forging or counterfeiting of any debenture, to be issued under the authority of the Act, or the tendering any such forged debenture for payment, knowing it to be forged, with intent to defraud Her Majesty or the person appointed to pay the same, to be forgery. It enacted that, for the purpose of redeeming the debentures, there should be imposed and collected on the proceedings in law and equity certain fees set forth in a schedule to the Act. It enacted that it

should be the duty of the Clerk of the Crown and Pleas and his several deputies, and of the Registrar of the Court of Chancery, and of the Clerk of the Court of Appeals, to collect the several fees imposed upon the proceedings in their respective Courts, and to account for the same to the Receiver General. It authorized the sale of a piece of land in the City of Toronto belonging to the Crown, and directed the proceeds arising from such sale to be applied also to the satisfaction of the debentures. It enacted that it should be lawful for the Governor, at any time, by proclamation, to call in any of the debentures, although the time for payment thereof may not have arrived; and that, at the expiration of six months from the date of such proclamation, all interest on the debentures so called in should cease. It enacted that accounts in detail, relating to the debentures, and the amounts received thereon, and paid, &c., should be laid before the Legislature at each session.

Now it is to be observed that the necessity recited in the Act, of making provision for the due accommodation of the Superior Courts, was a necessity the burthen of which was imposed upon the Government and Legislature of the Province. There was no reason existing, in common sense or justice, why the Law Society, any more than any single individual in the Province, should undertake to provide, or should be expected to provide, out of their own means and at their own peculiar cost, any sum towards the erection of the buildings then deemed necessary, much less that they should, at their own cost, maintain them when erected, and *supply all such additional buildings* as the exigencies of the country should, in all time to come, in the opinion of the Government of the day, require.

We must attribute to the Legislature the knowledge that upon the Government and Legislature, and not upon the Law Society, rested the obligation of providing all necessary accommodation for the Courts for all time to come; and in justice to the Legislature which passed the Act, we must relieve it from the imputation of entertaining any

design to impose by its legislative power that obligation upon the Law Society without at the same time providing ample consideration to the Society, and complete indemnity for their incurring the obligation referred to in the Act as the condition for the payment over of the £6,000 to the Society. We must conclude, therefore, that the Government and Legislature were of opinion, when that Act was passed, that the £6,000 was so much in excess of what was necessary for providing the accommodation *then* deemed sufficient, that it would leave a considerable surplus, the use of which, in advance, by the Society would indemnify them for all time to come, not only for maintaining the buildings then deemed sufficient, but for supplying from time to time such further accommodation as the future exigencies of the country could possibly require. Viewing, as I think we must, the transaction in this light, when we find how utterly mistaken the Government and the Legislature of that day were in their ideas of what would be required and would be sufficient for all time to come, we shall not expect to find the same language in subsequent Acts of the Legislature, when we are called upon to determine whether *they* sufficiently evince an intention to relieve the Society from the obligations of their covenant as we should look for, and as might be necessary for the same purpose, if the consideration given for the burthen imposed bore any reasonable proportion to the cost of the burthen.

If, in the altered circumstances, it strikes, as it must, every one, that the continuance of the obligation of the covenant would be inequitable in the extreme, we are, I think, in duty bound to seize upon any language in the subsequent Acts which will reasonably justify us in concluding that the intention of the Legislature in passing the subsequent Acts was to do what was just.

The Act passed on the 9th June, 1846, and on the 20th of the same month the covenant referred to in the Act was entered into under the seal of the Society. The instrument recites that it is executed in pursuance of the

Act, and thereby the Law Society, in consideration of the said sum of £6,000 paid to them, the receipt whereof is thereby acknowledged, covenant that they will at all times well, faithfully, and sufficiently find and provide, at their own costs and charges, and without further charge and expense to the Province, fit and proper accommodation for the Superior Courts of Law and Equity in Upper Canada, as now existing or hereafter to be constituted, for all time to come, at the seat of the said Society, *according to the true intent and meaning of the said Act of the Legislature in that behalf* and of these presents, and that if the Society should fail, neglect, or refuse to provide fit and suitable accommodation for the *now* existing, or at any time hereafter to exist, Superior Courts of Law and Equity, or should at any time permit any buildings in which such Courts should be held to become dilapidated, or unfit or inconvenient for the Courts, or out of repair, then that Her Majesty, her heirs and successors, should be at liberty to make all suitable and necessary repairs, and, if necessary, to provide other proper and suitable buildings and accommodation for the present or any future Superior Courts, and that the cost thereof should become a charge and be charged and chargeable upon all and every the lands, hereditaments, and premises of the said Law Society, and be recoverable thereout and therefrom *and from the said Society* in like manner as any other Crown debt. Now, although this instrument, being entered into and executed under the seal of the Society, requires no consideration to support it, and therefore the instrument itself could not be impugned for want of, or for inadequacy of consideration, still, when we are called upon to construe the intention of subsequent Legislatures as appearing in subsequent Acts, we cannot lose sight of this, that in reason, common sense, and justice, the fact of the Legislature having required the covenant to be given *in consideration of* the £6,000, and the fact of the Society having given the covenant, are wholly irreconcilable with any other idea than that the Government and the Legislature,

on the one part, who were getting relieved of a burthen naturally belonging to them to bear, and the Law Society, upon the other, who were assuming that burthen, were both of opinion that the consideration given by the Government was ample compensation for the burthen transferred to, and incurred by, the Society. The honour of the Government and of the Legislature requires us to regard this idea as lying at the very foundation of the contract.

Now the instrument set out in the special case recites the Act of the Legislature 9 Vic., ch. 33; and the covenant of the Society is to provide the necessary accommodation for the Courts for all time to come, "*according to the true intent and meaning of the said Act of the Legislature in that behalf.*" The enquiry, therefore, whether subsequent Acts of the Legislature have relieved the Society from the obligations of their covenant, would seem to resolve itself into an enquiry whether the subsequent Acts are of such a nature as to cancel, annul, and set aside the provision for the accommodation of the Courts made by the Act of 9 Vic., and to annul "*the intent and meaning of the said Act of the Legislature in that behalf,*" for if the intent and meaning of the Legislature, as appearing in that Act, as to the mode of providing for the accommodation of the Courts, are cancelled and annulled by the different provision in that behalf contained in the subsequent Acts, how can a covenant to provide, according to the intent and meaning of the former Act, be enforced, if the intent and meaning as expressed in that Act are annulled? Now the intent of that Act, as expressed therein, was that, upon payment to the Law Society of the £6,000, the Society, *in consideration thereof*, should *at their own cost, charges and expense*, provide all the necessary accommodation for all time to come, *without further charge or expense to the Province*; and that if they should make default, the Government for the time being might supply the defect, and the cost thereof should become *a debt* due by the Society *to the Crown*, and *be recoverable as such*, and fur-

ther should be a charge and be charged upon all the real estate of the Society. If the Legislature, in subsequent Acts, has made a provision for the accommodation of the Courts and for paying the expense thereof, wholly inconsistent with the provision made by 9 Vic., ch. 33, and has re-assumed the burthen naturally belonging to the Legislature, how can the intent and meaning of 9 Vic., ch. 33, *as to providing the accommodation*, be said any longer to exist? And if not, upon what principle can the covenant of the Society, to make provision *according to the intent of that Act*, be enforced when *that intent* no longer exists?

The next Act upon the subject is 18 Vic., ch. 122. That Act recited the execution by the Law Society of the covenant in consideration of the £6,000 paid to them under 9 Vic., ch. 33; that the Law Society had provided the necessary accommodation for the Courts, and had petitioned the Legislature, stating that in so doing they had incurred a debt of £4,000 in excess of the £6,000 which they had received. This petition is not set out in the case, but from the Act I think it sufficiently appears that the prayer of it was that they should be relieved from that debt, which is, in other words, that they should be relieved from the obligations of their covenant; but, whatever was the prayer of the petition, the Legislature has, in my opinion, regarded the petition in that light, and has made the provision necessary and adequate to give it effect. The preamble of the Act proceeds to recite that "since the date of the covenant so entered into by the Law Society, the Legislature has increased the number of the Superior Courts in Upper Canada, *and thus occasioned the necessity for further accommodation and additional expenditure*, and whereas it is expedient to assist the said Law Society." Now, if the Law Society were to continue to be held bound by their covenant executed in pursuance of 9 Vic., why was it *expedient* to assist the said Law Society? The reason, as it appears to me, is given in the previous recital; because the Legislature, having occasioned the necessity for further accommodation

and additional expenditure, beyond anything contemplated when the 9 Vic., ch. 33, passed, it was inequitable and unjust to hold the Society bound by their covenant. And *how* was it expedient to assist the Law Society? Not by lending them a sum of money, but, as the preamble says, by "discharging the said *debt* of four thousand pounds." "And *it is further expedient* to provide *increased* accommodation for the Superior Courts, *and in order to accomplish* the same *it is necessary* to extend and continue the provisions of the said recited Act." How long? "*Until the debt of the Law Society and all costs of the said alterations and further accommodation shall have been discharged and paid.*"

The Act, then, recognizes the Law Society as a creditor of the country for the sum of £4,000, being a sum expended by it in carrying into effect the intent of 9 Vic. beyond the sum of £6,000 paid to them for that purpose. The Act then enacts that debentures for £10,000 shall be issued, redeemable within 20 years; that for the purpose of paying the interest on those debentures and liquidating the principal thereof, there shall be levied the sums mentioned in the said recited Act 9 Vic., and "all the provisions of the said recited Act, so far as the same may be applicable, *are hereby extended to the debentures* to be issued under the authority of this Act, and to all matters *relative to the said debentures* and the sum *to be thereby raised*, in as full and ample a manner to all intents and purposes as if the said sum of £10,000 to be raised under this Act had formed part of the sum to be raised under the provisions of the said recited Act."

Now, here is an Act which recites the former Act and the covenant entered into in pursuance thereof; the improvidence of that covenant; the fact that over and above the £6,000 provided by the covenant, the Law Society had expended £4,000 out of their own funds; the inexpediency of holding the Law Society liable to the loss of that sum, as they must have been if their covenant was to be treated as continuing in force; the expediency of the public pay-

ing that sum as a debt due to the Society ; the necessity of still further accommodation for the Courts ; the *necessity* of providing therefor out of the public funds, which *necessity* could not exist if the covenant of the Society was to continue as binding ; and the Act makes provision for all further accommodation in all time to come, by *continuing* the tax upon proceedings imposed by 9 Vic., and extending its operation until the *debt* of the Law Society is paid and the cost of providing *all further accommodation* shall have been discharged and paid. This Act, as it seems to me, makes provision for supplying the necessary accommodation for the Courts, treating it as a duty belonging to the Legislature, by creating a public fund to continue in existence until the whole cost of the accommodation already provided by the outlay of the Law Society, in excess of the £6,000 provided by 9th Vic., and of all further accommodation, shall have been discharged and paid. This, in my judgment, shews that the Legislature regarded the duty of providing all such accommodation as a burthen belonging to the Legislature, and the mode of provision which is supplied by this Act is so inconsistent with the Act of 9 Vic. as to leave no doubt upon my mind that the Legislature contemplated the annulling that Act, so far as it related to the intent therein stated, of providing for the accommodation of the Courts, and the Act exhibits to my mind a very plain intent of *resuming* the obligation of providing for the accommodation of the Courts which, under the Act of 9 Vic. and the covenant executed in pursuance thereof had been imposed upon the Law Society. It has been argued that this is not so, and the argument that the intention was to place matters in every respect, as to the continuing liability and otherwise of the Society, as they were under 9th Vic. is rested upon the clause above quoted, to the effect that the provisions of the Act so far as applicable should be extended to the debentures and to the sum to be raised by the Act 18 Vic. in as full and ample a manner *as if the £10,000 had formed part of the sum to be raised under the provisions of 9 Vic.* If this construction

were correct it would, in effect, amount to this, that the intention of 18 Vic. ch. 122 was that it should operate as if the sum of £16,000 had been the sum paid to the Law Society, and expressed in the instrument executed by the Society as the consideration for their covenant therein contained. Now that such never could have been the intent of the Act is apparent from this, that such an intent is quite inconsistent with the expressed intent of paying the £4,000 to the Law Society as a liquidation of a debt incurred by it in excess of *the* £6,000, *the consideration of the covenant*, and that as to the residue of the £10,000, no provision is made in the Act for that sum being paid to the Law Society at all, as the £6,000 was provided to be paid by 9 Victoria : but the *words* of the Act are not open to the construction contended for. The provisions of the Act of 9 Vic., which are continued by 18 Vic., are not those in any manner relating to the covenant of the Law Society ; they are those only relating *to the debentures* to be issued for raising the £10,000, namely, those clauses providing for the continuance of the fee fund to redeem the debentures, and relating to the collection of these fees, and the clauses making it felony to forge or counterfeit the debentures, or to utter any knowing them to be forged, and the clauses relating to accounting in respect of the proceeds of the debentures. It was necessary to declare that these clauses should apply to the same extent as if £16,000 had been authorized to be raised under the former Act instead of £6,000, wholly irrespective of the application made, or intended to be made, of the money when realised by sale of the debentures ; but the expressed continuance of those provisions of the Act, relating to the debentures, would seem to be a repeal by implication of the Act relating to the provision for the accommodation of the Courts and the covenant of the Law Society executed for that purpose ; if the different provisions made for such accommodation, so utterly inconsistent with the former mode provided, did not constitute a direct repeal of such former mode.

Then the Act 20 Vic. ch. 64 is consistent with, and only

consistent with, the idea that by 18 Vic. the Legislature had *resumed* the obligation of providing the necessary accommodation for the Courts, which under 9 Vic. and the covenant executed in pursuance thereof, had been imposed upon the Law Society. It recites that the *sum granted by 18 Vic.* was insufficient for the purpose, and that *it was necessary* to grant additional aid therefor, and for that purpose to increase the fee fund which had been established by 9 Vic.; and it authorizes the issue of debentures for the further sum of £10,000. The Law Society is no longer named either as a petitioner for relief from the supposed continuing obligation of their covenant, nor as recipient of any part of the £10,000 additional sum authorized to be raised. For the purpose of redeeming *all* the debentures previously issued, as well as those about to be issued, the fee fund is increased; and as in the 18th Vic., and for the same purpose, the provisions of 9 Vic., so far as applicable, were extended *to the debentures* authorized to be issued under 20 Vic., in as full and ample a manner as if that issue had also been authorized to be raised by 9 Vic. This Act is just such an Act as would be passed by the legislature for providing for a burthen resting on the legislature, and is quite inconsistent in my mind with the idea, that at the time of the passing of 20 Vic. that burthen continued to be borne by and to rest upon the Law Society under their covenant.

Then comes the 22nd Vic. ch. 31, which again recites that the sums of money *granted by 18 and 20 Vic.* were insufficient for the erection of buildings suitable for the accommodation of the Superior Courts of Law and Equity, and that *it was necessary* to grant additional aid therefor, and still further to increase the fee fund; and it authorizes the issue of debentures for the further sum of £30,000, redeemable in 20 years, and for the purpose of redeeming *all the former* debentures as well as those for the £30,000, it constitutes a largely increased fee fund, and as in the cases of 18 and 20 Vic., and for the like reason, it provides that the clauses of 9 Vic., relating to debentures, shall

extend to the newly authorized debentures in the same manner as if the £30,000 also had been authorized to be raised by 9 Vic.

We are referred, then, to the Consolidated Statutes of Upper Canada, ch. 33, sec. 6, of which, while professing to be a consolidation of 22 Vic. ch. 31, inserts a preamble as if it was the preamble of that Act, but which that Act has not. From this preamble, which, if construed as contended it should be, is repugnant to the truth to be collected from the Acts which I have recited, an argument has been used in support of the contention that the covenant of the Law Society still remains obligatory. We cannot, however, I think, consider the preamble as containing an assertion of a fact which is plainly contradicted by the provisions of the Acts recited, and the provisions of the 6th clause of ch. 33, in which they are recited.

The 6th clause recites as follows: "Whereas the Law Society of Upper Canada did on the 20th day of June, 1846, covenant with her Majesty to provide, at the seat of such Society, buildings suitable for the accommodation of the Superior Courts of Law and Equity in Upper Canada for all time to come." Now so far the preamble is undoubtedly true; it proceeds, however, "and for the purpose of carrying out the said *arrangement*, four several sums of money, amounting to the sum of \$224,000 were by four several statutes granted to her Majesty, to be raised by debentures as in said Acts provided." Now what is meant by the words, "and for the purpose of carrying out said *arrangement*, four several sums of money," &c.? It is contended that this recital is a declaration that the "*covenant*" of the Society is still in existence, and that these four several sums were paid in pursuance of the arrangement upon which that *covenant* was executed; that is, in other words, *as the consideration* of the covenant. The Acts of the Legislature and the covenant itself shew that this is not so. The word "arrangement" cannot have been used in any such sense. The way in which the expression came to be inserted here at all, I have no doubt, was by the consolida-

tors of the statute finding in the preamble of 18 Vic., after a recital of the covenant, the recital following: "and whereas for the purpose of carrying out the said *arrangement*," a tax or levy on certain proceedings in the Superior Courts of Law and Equity, and the Court of Appeal was authorized under and by virtue of the said recited Act, which the consolidators of the statute have rather carelessly converted in the Consolidation Act into a recital, that for the purpose of carrying out the said arrangement four several sums of money were by four several Acts granted to her Majesty, &c., &c. Now these Acts being referred to in the recital in the words, "as in the said Acts provided," we may refer to the Acts, and upon so doing we find that the sums granted by 18, 20, and 22, Vic. ch. 31, to her Majesty were *not* by those Acts provided to be paid to the Law Society at all. They were granted to supply a public need not as moneys advanced by the Government *under* the covenant, in which case they would have constituted a debt due by the Society to the Government under the covenant. The arrangement for providing the accommodation made by the above Acts is, in my judgment, wholly inconsistent with, and plainly in substitution *for*, the arrangement provided by 9 Vic. and the covenant executed in pursuance thereof. A reference to the Acts, therefore, shews that the sums granted by 18 Vic. and the subsequent Acts to her Majesty cannot with any truth be said to have been paid under the covenant, or "in pursuance of the arrangement involved in the covenant; but if the words in the recital, "for the purpose of carrying out the said arrangement," be construed as, "for the purpose of providing the accommodation," in the previous sentence spoken of, "\$224,000 were granted to her Majesty," the recital will be true. The Act proceeds to recite: "And whereas by such Acts provision was made for the purpose of paying off said debentures, and it is expedient to continue such provisions for purpose of liquidating the debts so incurred;" and it enacts that for the purpose of paying the interest on the debentures

issued under the said Acts, and of liquidating the principal thereof, there *has been* and shall continue to be imposed, levied and collected," (the tariff established by 22 Vic. ch. 31.) We have, then, in the enacting clause of the Act, containing the above preamble, provision made for the continuance of the fund to redeem those sums of money granted to her Majesty, which provision, as I have said, is, in my judgment, wholly inconsistent with, and plainly in substitution for, the arrangement made for the accommodation of the Courts involved in the covenant. The recital, therefore, cannot be read as declaratory of the fact that the moneys were advanced *in pursuance of the covenant*, or as declaratory of *its* continuing obligation.

It is stated in the case, although not provided for in the Acts, that the several sums were expended by and under the supervision and management of the Law Society, in the erection of Osgoode Hall, for the accommodation of the Courts, upon lands of the Society. That there was an arrangement between the Government and the Law Society that the Courts should be erected on this property of the Law Society from the beginning, I suppose there can be no doubt, and that the moneys were expended in pursuance of such arrangement may be admitted, and is, no doubt, true, and perhaps this is the "arrangement" which the consolidators of the statute had in view; but whatever was intended by the consolidators of the statute in introducing this recital for the first time into an Act of the Legislature, we cannot give to the recital a construction at variance with the enacting clauses of all the Acts referred to, and of the Act itself in which alone the recital is found.

Upon the passing of this Consolidated Statute, the Acts of 18 Vic., and 20 Vic., and 22 Vic., ch. 31, became utterly extinct and repealed. 9 Vic. became extinct even for the purpose for which it had been kept alive by 18 Vic., and 20 Vic., and 22 Vic., ch. 31; provision for collection of the fee fund was made by Consolidated Statute, ch. 33, sec. 8; and provision for the protection of the debentures, declaring it to be felony to forge or counterfeit them, or to utter

one knowing it to be forged, was made by Consolidated Statute of Upper Canada, ch. 101, sec. 5. In Schedule A, annexed to the Consolidated Statutes, 9 Vic. and the others are declared to be repealed. In Schedule B we find that those sections 1 and 2 of 9 Vic., which provided for the accommodation of the Courts through the medium of the covenant of the Law Society, are entered as "effete," and that they were so from the time of the passing of 18 Vic., ch. 122, I confess I entertain no doubt. Since the passing of the Consolidated Statute, ch. 33, *all the legislation which is in existence* relating to providing accommodation for the Superior Courts is that Act, and the mode of provision thereby sanctioned is out of the fee fund thereby established to redeem *all* the debentures previously issued. This mode of provision is wholly inconsistent with the idea that the Law Society shall, at its own expense, out of its own means, and free of all charge and expense to the Province, provide the necessary accommodation. The Act which authorized the latter mode of provision is utterly repealed; its intent and meaning altered, cancelled, and done away with; a new intent and meaning of the Legislature declared in substitution therefor. How then can a covenant, *only* executed for the purpose of carrying out the intent and meaning of 9 Vic., be held to be of any obligation when the Act itself, and its intent and meaning, are utterly extinguished, repealed and wiped out the book of the Acts of the Legislature?

It has been contended that, although it cannot be denied that the provision made under 18 Vic. and the subsequent Acts cannot be treated as sums expended by the Government *in pursuance of* the provision of the covenant of the Society in that behalf, and that therefore these sums cannot be charged upon the Law Society or their lands as a debt due to the Crown, still, that the covenant of the Society, to keep in repair the buildings from time to time in existence, continues in full operation. I confess I can see no force in such argument, for the

covenant to keep in repair is only a branch of the covenant required by the Act 9 Vic. to be given before the £6,000 should be paid over, namely, "to provide fit and proper accommodation for the Superior Courts of Law and Equity for all time to come," and if the Society is relieved from the obligation to provide such accommodation, it cannot be under the obligation of doing the ancillary or subsidiary act of repairing.

Performing *necessary* repairs (and *unnecessary* repairs cannot be enforced), is an act involved in the act of providing for all time to come "*fit and proper accommodation* for the Superior Courts." If relieved from the latter obligation, the Society must of necessity be relieved from the former.

Construing, then, the covenant, as we must in all reason, as it is expressed to be, a covenant only to provide the accommodation *according to the intent and meaning of that Act, 9 Vic.*, I am of opinion that the 18 Vic. and the other subsequent Acts above mentioned, plainly evince that the Legislature had abandoned all idea of providing for the accommodation of the Courts under the provisions of 9 Vic., or according to the intent and meaning of that Act, and had repealed all the provisions of that Act relating to the mode of providing accommodation for the Courts, and cancelled and annulled "the intent and meaning of the Act in that behalf," and that therefore a covenant which was only brought into existence as a creature of the Act, and for the purpose of carrying out its provisions, *and of giving effect to its intent*, must fall with the Act itself; and the Law Society cannot be, and could not have been, since the passing of 18 Vic., ch. 122, sued for a breach of their covenant in not providing accommodation according to the true intent and meaning of the Act 9 Vic., whether the alleged defect in the accommodation consisted in not erecting or in not repairing.

The payment by the Government of \$2,000 in 1865 for necessary repairs was, in my judgment, a payment proper to have been made by the Government, as the party then

chargeable with the making of these repairs, and this payment, together with the covenant of November, 1867, whereby the Society, in consideration of \$3,000, to be paid annually to them, covenanted to light and heat the buildings, and to pay and bear all expenses connected with the maintenance of the apparatus therefor, are inconsistent with the covenant of June, 1846. Surely, in the covenant, to "provide for all time to come *fit* and *proper* accommodation for the Superior Courts of Law and Equity, as now existing or hereafter to be lawfully constituted," is included the providing light and heat, if light and heat are, as they must be held to be, essential to the accommodation of the Courts. An argument was used, the force of which I have not been able to appreciate, in support of the contention for the continuing obligation of the covenant, founded upon the fact, not stated in any of the Acts of Parliament, but still an admitted fact, that the buildings used for the accommodation of the Courts have been erected upon the fee simple lands of the Law Society. I cannot see how this fact, which discloses a *gratuitous gift* to the government of a site for the buildings, can afford any argument in support of the continuance of the liability of the Law Society to supply gratuitously the further sums which may be necessary to keep the buildings in repair.

I have arrived at this conclusion, as the one which, in my judgment, a fair and rational construction of the language of the Acts leads to. It was admitted, on the argument, by counsel arguing this case on behalf of the government of Ontario, that *no reason* can be given why the Law Society *should* be subjected to the expense of repairing the buildings and keeping them suitable for the accommodation of the Courts, without receiving adequate compensation therefor, but it was stated that prior to any legislation upon the subject, the opinion of the Court was desired as to the legal obligation, if any there be, continuing to be imposed upon the Society under their covenant in view of the subsequent legislation. The conclusion which I have felt myself bound to arrive at is, as it appears to me, conformable

to law, and the only one which is compatible with the honor of the several Legislatures which passed the Acts 18 Vic. and subsequent Acts, who cannot, I think, be assumed to have contemplated that the Law Society should be held bound by the covenant when they were making provision for the accommodation of the Courts at the cost of the public, as a public duty belonging to the Legislature, so totally different from that provided by the covenant, which in effect, as events subsequent to the execution of the covenant shew, was a covenant to indemnify, without consideration, the Legislature, from the cost of this charge naturally belonging to them.

We have been referred also to an Act of the Ontario Legislature, 33 Vic. ch. 9, but no argument in favor of either side was pressed upon us as derived from that Act. If prior to that Act the obligation of the covenant had been by the course of legislation discharged, as I am of opinion it had been, then there is no *expression* in this Act pointing to the *revival* by legislative power of an extinct obligation.

The object of the Act was to do away with the distinction in respect of fees payable to the Crown, and to merge all, including those levied under what was termed the Law Fee Fund, into the Consolidated Revenue Fund; then out of the consolidated fund so constituted there is, by section 3, granted in lieu of and as equivalent for the Law Society fees and charges, until the legislature shall otherwise order, the sum of \$29,000 annually, which shall be accounted for to the Law Society.

Now, that by reason of this grant to the Law Society of \$29,000 per annum out of the fees created by the tax upon law stamps, there should arise a trust imposed upon the Law Society to apply that sum towards providing the accommodation for which the sum was originally established is one thing; but it is quite a different thing to say that such a grant shall operate by implication as a revival of an extinct covenant: indeed, as it seems to me, the grant itself affords additional evidence that the obligation

of the covenant is extinct ; for how can a grant of \$29,000 out of the *consolidated revenue* to the Law Society, although affected with a trust to apply that sum towards affording the necessary accommodation for the Courts, which sum is assumed to be sufficient for that purpose for all time to come, operate as the revival of a covenant to supply all that necessary accommodation *at the costs and charges of the Law Society, free of all cost, charge, and expense to the Province*. There may be, and doubtless is, a trust annexed to this grant that the Society shall apply this fund towards providing the necessary accommodation, but what the extent of that trust is, is not the question submitted to us, but whether the liability under their covenant of 1846 still continues, and the grant in itself is, in my judgment, inconsistent with the continuing obligation of that covenant.

GALT, J.—I have had very great difficulty in forming an opinion on this case. At first it appeared to me that we must consider the legislation which has taken place as in effect intended to discharge the Society from the obligations assumed by them by the covenant of 20th June, 1846 ; but, on a careful consideration of the last two Acts, namely, Con. Stat. U. C. ch. 33, and the 33 Vic. ch. 9, I have arrived at a different conclusion.

By the former the Legislature has recognized the covenant as in full force, not only as regards the maintaining the buildings suitable for the accommodation of the Courts of Law, but as to their construction ; and by the latter they have provided ample means for the discharge of the debt. Section 3 enacts that until the Legislature shall otherwise order, a sum of \$29,000 a year shall be carried to the credit of the Law Society, and shall be accounted for to the Law Society of Upper Canada by the Province of Ontario. Such a provision would be quite unnecessary unless for the purpose of discharging what the Legislature considered to be a debt from the Society, and as the Society are not in any way indebted to the Government except under their covenant, it appears to me to follow that the Legislature, by

the passing of the Act, have treated and considered the original agreement as still subsisting. It can be a matter of very little moment to the Society whether they are called upon to maintain the buildings or not, so long as such ample means are provided : the only effect of their doing so will be that the ultimate discharge of the debt will be postponed.

I therefore agree with the Chief Justice, that our judgment should be for the Crown.

Judgment accordingly.

McKEE V. JOLI ET AL.

Striking out and adding defendants at trial—Amendment.

At the trial, on objection by defendant's counsel, that one of the defendants had been improperly joined in the action, the Judge, on plaintiff's application, struck his name out of the record ; and upon defendant's counsel claiming the right to plead in abatement the non-joinder of another party, with the consent of the latter, his name was added to the record : *Held*, that the first amendment had been properly made, but not the second.

Action against Joseph Joli and Antoine Meloche upon a joint contract.

The defendants appeared jointly by attorney and pleaded a denial of the contract alleged.

At the trial, before Morrison, J., it appeared that Meloche had been no party to the contract sued upon, but that it was the joint contract in writing of Joli and Louis Tourangeau, which latter had assigned his interest in the contract to Meloche. All this appeared in the evidence of the plaintiff himself, who was called on his own behalf.

At the close of plaintiff's case counsel for the defendants objected that the contract proved was that of Joli and Tourangeau, and not of Joli and Meloche, and he claimed therefore a verdict for the defendants. Plaintiff's counsel thereupon applied to strike out the name of Meloche. This was objected to, but the learned judge ordered Meloche's

name to be struck out, subject to any objection as to his right to do so. The name of Meloche was thereupon struck out of the record. Joli's counsel then claimed the right of pleading, in abatement, the non-joinder of Tourangeau. His right so to plead was conceded, but to prevent it plaintiff's counsel applied, upon a written consent of Tourangeau, authorizing plaintiff's attorney to insert his name as co-defendant with Joli, to add Tourangeau as a defendant. The learned judge, Joli's counsel objecting, ordered the record to be amended, and the same was amended accordingly, by adding Tourangeau as co-defendant with Joli, and with Tourangeau's consent, Judgment by *nil dicit* was entered against him upon the record. The case then proceeded, subject to the right of Joli to object that the learned judge had no right to make these amendments, and a verdict was rendered for the plaintiff.

Christopher Robinson, Q.C., obtained a rule, upon behalf of Joli, to set aside the verdict so rendered, upon the ground that the learned judge had no power either to strike out the name of Meloche or to insert that of Tourangeau, or to proceed with the trial as if Joli and Tourangeau had been the persons against whom the action was brought.

Albert Prince, Q.C., shewed cause, and *Robinson* supported the rule, citing *Chitty's Arch. Pr.* 12 ed. 404, 405, 565; *Garrard v. Guibilei*, 13 C. B. N. S. 832.

GWYNNE, J., delivered the judgment of the Court.

The 68th section of the Common Law Procedure Act, 22 Vic. ch. 22, provides that a non-joinder of defendants *may* be amended *as a variance* at the trial, in like manner as a misjoinder of plaintiff's may be by the 68th section, upon such terms as the Court or judge, or other presiding officer, by whom such amendment is made, thinks proper. Meloche, doubtless, might reasonably have expected that before his name should have been struck off the record, provision should have been made for the payment of his

costs, and if the learned judge had been pressed upon that point no doubt he would have provided for the payment to Meloche of his costs ; but he was not asked to do so. No objection was made at the trial, or since before us, upon the part of Meloche, that he has been wronged by being struck off the record as a defendant, without provision being made for his costs : the only objection made is made by Joli, and that objection is, that the learned judge had no power to make the amendment by striking out Meloche's name. No argument was urged before us upon which *that* objection rests, and upon the authority of *Robson v. Doyle* (3 El. & Bl. 396) ; *Greaves v. Humfries* (4 El. & B. 851) ; *Johnson v. Goslett* (18 C. B. 743), and *Wickens v. Steel* (2 C. B. N. S. 490), we think he had. It was not urged that Meloche had been designedly made a defendant for the purpose of seeking to fix him with liability, although why he should not have been made a defendant, when the plaintiff held the written contract of Joli and Tourangeau, which was the contract he was suing upon, did not clearly appear : however, no such point was taken. In so far therefore as striking out Meloche's name is concerned, we think the learned judge had jurisdiction ; but the defendant Joli was under the circumstances reasonably entitled to have leave to plead in abatement, and the question remains, had the learned judge power to add Tourangeau as a defendant, and so obviate the necessity of a plea in abatement ? That by his so doing he has done no prejudice to the defendant Joli, we think, is plain ; but upon reference to the 68th section of the Common Law Procedure Act, and upon consideration of *Garrard v. Giubilei* (13 C. B. N. S. 832), we are bound to say that we think it clear that no provision is made in the Common Law Procedure Act for adding a defendant at the trial, with or without his consent, who had not been, but should have been, made a defendant. The framers of the Act appear not to have contemplated the possibility of there being found a person so accommodating as to consent at a trial to be made defendant in the place of another, and therefore they made no provision for such

an event. Tourangeau, therefore, has not been effectually made a party defendant. We think, therefore, that the verdict must be set aside, and that Joli should be at liberty to plead in abatement, so that Tourangeau may be made a defendant effectually under the 69th section of the Act.

Rule accordingly.

ROYAL CANADIAN BANK V. KELLY.

Replevin—Avowry setting out several independent matters—Plea of non tenuit—Evidence.

In replevin, to an avowry setting out a mortgage and demise to the mortgagor, the entry thereunder, non-entry of mortgagee and non-exercise of power of sale, the permitting mortgagor to continue as tenant, and that while so occupying there was a large arrear of interest, &c., &c., plaintiffs simply pleaded *non tenuit*, and under it sought to give in evidence the fact of payment of the mortgage before distress, with a view to shewing that there was, consequently, no tenancy: *Held*, inadmissible.

REPLEVIN.

Avowry, that the lands mentioned in the declaration were the soil and freehold and in actual possession of one Dewey, who by statutable mortgage, on 23rd February, 1866, did grant same to defendant Kelly, in fee, subject to proviso for redemption on payment of \$25,000 on or before 1st February, 1867, with interest at six per cent. : proviso, that Kelly, on default for one month, might enter and lease, or sell, and might distrain for arrears of interest, and Dewey should have quiet possession till default; that Dewey thereunder entered and was possessed of the premises, and had held, used, and occupied the same as tenant of Kelly, and so continued to hold same until at and after the alleged taking, &c.; that Dewey made default in payment of the interest at time appointed for payment and did not at any time pay any interest, and Kelly did not enter by reason of the default, but permitted Dewey to

continue to occupy as his tenant; and at time when and while Dewey so continued to occupy a large sum, *sc.*, \$3000, for interest on the principal moneys from the date of the mortgage to 1st January, 1868, was due and in arrear from Dewey to Kelly; wherefore Kelly well avowed, &c., and the other defendants as his bailiff, &c., as a distress.

Plea, that Dewey did not hold or continue to hold the lands, until the taking, as tenant to said Kelly.

At the trial, before Gwynne, J., at Cobourg, the mortgage was proved.

Martin, one of the defendants, proved making the distress under warrant from defendant Kelly. He seized plaster, &c., at Dewey's mill at Colborne, and lumber at his saw mill on the lands included in this mortgage. Dewey's employees were in possession then. The premises had been in Dewey's possession certainly for two years before the distress. The plaintiffs replevied. It was proved that nothing had been done to disturb Dewey in the possession from the execution of the mortgage to the time of distress.

For plaintiff it was argued that after default it was necessary to establish a new actual tenancy by agreement, and as the distress was over six months after the day of payment in the mortgage, it was not authorized by statute, and that a firm being in possession, it was not the tenancy of the mortgagor.

Dewey, the mortgagor, was called. He said the firm consisted of himself and his two brothers, and continued till they broke up a year ago; that if there had been profits of the business he would have charged the firm for the use of his property; that there were no profits or settlement, and he had entire control over the mortgaged property.

Plaintiff offered to prove that the mortgage was satisfied when distress was made. This evidence was objected to.

The learned judge refused to receive it under the issue of *non tenuit*.

The jury found for the defendants.

In Easter Term *Harrison*, Q.C., obtained a rule for a new trial on the law and evidence; that at the time of taking no tenancy existed at an annual or other rent, entitling the mortgagee to distrain; that no such tenancy was created by the mortgage; that the tenancy, if any, expired more than six months before the taking; that no new tenancy was created which gave the right of distress; that the premises were in possession of a firm of which mortgagor was a partner, and not in mortgagor's possession; or for a new trial, for rejection of evidence, to shew that the mortgage was satisfied before the day fixed for payment, and before distress made.

Armour, Q.C., and *C. S. Patterson* shewed cause, citing *Mason v. Parker*, 16 Gr. 81, 230; *Clowes v. Hughes*, L. R. 5 Ex. 160.

Harrison and *H. Cameron*, contra, cited *Hydes v. Moakes*, 5 C. & P. 42; *Mason v. Parker* and *Clowes v. Hughes*, *supra*.

HAGARTY, C. J., delivered the judgment of the Court.

All the points set out in the rule, except two, are disposed of by the judgment of my brother Gwynne in this Court, 19 C. P. 196 and 430.

The first new point is that Dewey's firm, and not Dewey himself, as mortgagor, were in possession. The evidence of Dewey himself at the trial disposes, we think, of the objection. He was the sole owner of the land, and no other person had any interest in it by title, contract or otherwise.

The second point is, that under *non tenuit* plaintiff might prove that the mortgage was satisfied before day of payment and before distress. Mr. Harrison argued that if there was nothing due or remaining unpaid on the mortgage there was no tenancy; but, to an avowry setting forth a number of independent facts—the mortgage and demise, the entry thereunder, the non-entry by mortgagee and non-exercise of the power of sale, that Dewey was permitted to continue as tenant, and that while he so occupied there was a large arrear of interest—the plaintiffs plead

simply denying the tenancy. This seems to be, as my brother Gwynne suggested at the argument, offering to traverse the legal result of all the facts, viz., the tenancy, instead of the facts from which the tenancy arose; and if the plaintiffs can put the payment, or non-payment of the mortgage money and interest, in issue on this plea, can they not equally put in issue all the other facts stated in the avowry?

It was open to plaintiffs to have asked for leave to plead with *non tenuit*, the plea that mortgage money and interest had been paid, if such plea would be a defence. To allow the question to arise under *non tenuit* would seem to be opposed to all rules of pleading.

It is to be observed that the avowry alleges that, in pursuance of the proviso for mortgagor retaining possession till default, Dewey *entered and was possessed of said lands, and held same as tenant to Kelly, the mortgagee*; so that he was in, not in his original estate, but under the demise in the mortgage, and so continued down to the taking. It seems to me, therefore, that *non tenuit* does not properly raise the question of payment or non-payment, but merely traverses the fact of tenancy as alleged, and not the other matters of fact stated in the avowry.

Rule discharged.

MEMORANDA.

During this Term the following gentlemen were called to the Bar:—ALEXANDER GREY McMILLAN, ROBERT CHARLES SMITH, FREDERICK JOHN FRENCH, JOHN GEORGE HODGINS CHARLES WILLIAM BELL, WILLIAM FITZGERALD, ARCHIBALD FREDERICK CAMPBELL, DAVID JUNOR, WILLIAM WILSON HOLCROFT, JAMES WILLIAM SHARPE, JAMES WATKINS WELLINGTON WARD.

IN THE COURT OF ERROR AND APPEAL.

TODD (*Respondent*) v. LIVERPOOL AND LONDON GLOBE
INSURANCE COMPANY (*Appellants*). (*a*)

Insurance—Warehouse receipt—Insurable interest.

A., a warehouseman, insured certain wheat with the defendants' Company, and assigned the policy to a bank, to whom he gave a warehouse receipt, signed by B., his clerk, and endorsed by himself. In an action on the policy, on behalf of the bank, *Held*, reversing the judgment of the Court of Common Pleas, 18 C. P. 192, Spragge, C., Mowat, V. C., and A. Wilson, J., dissenting, that the bank had no insurable interest, as B. was not a warehouseman within the C. S. C., ch. 54, sec. 8, and that the receipt was not in compliance with 24 Vic., ch. 23, sec. 1, not being signed by the *warehouseman*.

APPEAL from a judgment of this Court, reported in 18 C. P. 192, where the pleadings and facts will be found stated.

The following were the grounds of appeal: 1st. Because the receipts, purporting to be warehouse receipts, were not warehouse receipts sufficient to pass the property mentioned therein to the Royal Canadian Bank, the beneficial plaintiffs in this case, being signed by a clerk in the warehouse in favour of his employer, the keeper of the warehouse, whereas, under the provisions of the Act 24 Vic., ch. 23, a warehouse receipt issued under the provisions of that Act must be signed by the warehouseman himself, if made in his own favour; and that as it was under the provisions of this Act and the Act ch. 54 of the Consolidated Statutes of Canada, intituled "An Act respecting Incorporated Banks," that banks in this Province are enabled to make advances on cereal grains and

(*a*) Argued 21st February, 1870, before Draper, C. J. of Appeal, Spragge, C., Morrison, J., A. Wilson, J., Mowat, V. C., Gwynne, J., Strong, V. C.

merchandise, it followed that as the receipts were not in accordance with the provisions of the first mentioned Act, no property passed to the Royal Canadian Bank in the wheat mentioned in the said receipts. 2nd. Because it was shewn by the evidence, that the plaintiff had, by a receipt signed by himself, sold and disposed of more wheat previously to the fire, than was in the warehouse at the time of the fire belonging to the plaintiff. 3rd. Because the evidence shewed that the plaintiff had, after the application of 17th December, 1866, on which the policy in the first count of the declaration mentioned was granted, placed an elevator in the building in which the wheat insured was stored, and had given no notice thereof to the defendants, whereby the policy in that count mentioned was null and void. 4th. Because the evidence shewed that the plaintiff had, previously to the application of 10th January, 1867, on which the policy in the second count of the declaration mentioned was granted, begun the construction of an elevator, and no mention thereof was made in the said application, and that, after the policy was granted, the plaintiff placed an elevator in the building in which the wheat insured was stored, and had given no notice thereof to the defendants, whereby the policy in that count mentioned was null and void. 5th. Because the evidence shewed that there was a large quantity of the wheat insured saved from the fire, and that no deduction from the amount of wheat in the warehouse at the time of the fire was made for such salvage, whereby the damages assessed were much larger than they should have been.

Anderson, for the appellants. The first objection is to the form of the receipt, as not being within the Warehouse Receipt Act. Todd sues as trustee for the Royal Canadian Bank. The bank *must* bring themselves within the Statutes; if they have no interest the action fails. They had no possibility of advantage, if the property had been saved (*i.e.*, legally), and had nothing to lose. The plaintiff below rested his case on the amending Act, introduced as

a proviso to sec. 8 of the first Act. Literally, this receipt was not given and endorsed by Todd, and is not according to the proviso; but the plaintiff contends "Robert Coleman" is to be read "Robert Todd:" see *Royal Canadian Bank v. Miller*, 28 U. C. R. 593. Increase of risk is a material allegation; but this question was not left to the jury, for they were directed that it was immaterial, which was telling them that they need not consider it; therefore they have not decided it. The jury had only to consider whether plaintiff had done that which, by understanding express between defendants' agent and plaintiff, was made an increase of risk. This was not adding to a written instrument: it was only the explanation by both parties of a term undefined by the parties. He referred to *Taylor*, Evidence, 138, 149; *Lindley v. Lacey*, 17 C. B. N. S. 578, 17 C. B. N. S. 578, 10 Jur. N. S. 1103; *Malpas v. London and South-Western R. W. Co.*, L. R. 1 C. P. 336.

The Judge directed the jury to find for plaintiff, and they found for the defendants on the question of increase of risk. The Court below assumed the Judge was wrong in his direction on this point.

Harrison, Q. C., contra. A new trial was not asked for to have the question of fact, as to increase of risk, submitted to the jury. Defendants' counsel assumed the Judge's view was right.

1st, as to insurable interest: see Todd's application to the bank. Coleman swears he would not, after he had signed these receipts, have given or let Todd have the wheat. Coleman swore this grain was in the warehouse when these receipts were given and when the fire took place, on 15th March. Either the grain belonged to the bank, or they had an insurable interest: Con. Stat. C. ch. 92.

[DRAPER, C. J.—I have no doubt a clerk to a warehouseman may give a receipt in his owner's name under the first Act.]

It is a good receipt one way or other: see *McLean v. Buffalo, &c., R. W. Co.*, 23 U. C. 470. The Insurance Company knew the property was (to be) pledged for advances

to Todd : see *Marks v. Hamilton*, 7 Exch. 323. The bank were in possession, and were answerable over for it : see *Davies v. Home Insurance Company*, 3 Err. & App. 269 ; *Wilson v. Jones*, L. R. 1 Exch. 193 ; *Sparkes v. Marshall*, 2 Bing. N. C. 773 ; *Milligan v. Eq. Ins. Co.*, 16 U. C. 314. The bank were in possession under sec. 4 of ch. 54 ; *Waters v. Monarch Life Ass. Co.*, 5 E. & B. 881 ; *Stevenson v. Lancashire*, 26 U. C. 148. As to the third and fourth grounds of appeal, the learned Judge made no question for the jury as to increase of risk. The jury disbelieved the insurance agent as to the increased risk : the conversations, as he states, never took place. The attempt, however, is to introduce a condition to avoid the policy by parol. The condition, as it stands, is against the Judge's charge ; it is necessary that there should be an increase of risk as well as an addition : see *Stokes v. Cox*, 1 H. & N. 320-523 ; *Baxendale v. Harvey*, 4 H. & N. 445 ; *Date v. Gore Dist. &c., Ins. Co.*, 15 C. P. 175, 181. As to the fifth ground of appeal, this was not raised on the motion for a new trial.

Anderson, in reply. In *Marks v. Hamilton* the declaration contained an averment that at the time of the insurance plaintiff was interested. Here, plaintiff must have an interest in the property insured at the time they got the assignment of the policy.

DRAPER, C. J. OF APPEAL (June 27th, 1870).—The declaration in this case contains two counts ; 1st. Upon a policy of assurance against loss by fire, dated 17th December, 1866, made by the defendants to the plaintiff, on wheat and other grain contained in a building owned by one Carter, and occupied as a store or warehouse, in Seaforth, stating that plaintiff at the time of making the policy, and while it was in force, was interested in the insured property until the endorsement and transfer of the warehouse receipt, hereinafter mentioned, to the amount insured thereon, and that while such policy was in force, plaintiff, having a warehouse receipt for all the wheat so insured, duly en-

dorsed and transferred the same and the said wheat to the Royal Canadian Bank, to secure the said bank for an advance of money then made by said bank to plaintiff, by discounting a promissory note on the security of the said warehouse receipt and policy, which policy was then, with consent of defendants, transferred and assigned by plaintiff to the said bank. The declaration further averred the interest of the bank in the warehouse receipt and policy, and that the wheat was destroyed by fire, and a loss thereon, and that plaintiff was therein interested to the said amount, and as trustee for the Royal Canadian Bank: *breach*, non-payment. 2nd. On a second policy of a similar character, and containing similar allegations and averments, and a similar breach.

The pleas raised two questions; 1st, whether the policies were avoided by a small additional building which was put up outside of and adjoining the warehouse, in which it was alleged there was an elevator, whereby the risk was increased; and 2nd, whether the evidence established that the plaintiff or the Royal Canadian Bank had any interest in the wheat insured.

The plaintiff owned or rented a warehouse in Seaforth for storing wheat, &c. He was also a dealer in such grain, &c., as was usually deposited in his warehouse. One Robert Coleman was his clerk. At the trial the following documentary evidence was put in:

(1st) A warehouse receipt as follows:

"Received in store from Robert Todd, owner, 1,000 bushels No. 1 spring wheat, to be delivered pursuant to his order, to be endorsed hereon. This receipt to be regarded as a receipt under the provisions of Statute 22 Vic. ch. 20, being 22 Vic., ch. 54, of the Consolidated Statutes of Canada, and the amended Statute 24 Vic., ch. 23.

"(Signed) ROBERT COLEMAN.

"SEAFORTH, C. W., 27th December, 1866."

Endorsement thereon: "To be shipped pursuant to the order of the Royal Canadian Bank.

"(Signed) ROBERT TODD."

(2nd) Annexed to this receipt was a promissory note, dated 27th December, 1866, made by the plaintiff, payable to the order of the Royal Canadian Bank at their office in Seaforth, three months after date, for \$1,000.

(3rd) Another warehouse receipt, dated 10th January, 1867, in similar terms, and signed "Robert Coleman," for 1,000 bushels of spring wheat, and 500 bushels fall wheat, endorsed, "To be held and shipped pursuant to the order of the Royal Canadian Bank.

"(Signed) ROBERT TODD."

Annexed to this receipt was a promissory note, at sixty days, dated 10th January, 1867, made by Todd, payable as the one above, for \$2,000.

These documents, and Coleman's evidence, were the proof of the plaintiff's interest.

Coleman's statement as to them was: "I signed these receipts in favour of plaintiff at his request. Todd owned or kept the warehouse, and I was his clerk." He also added that Todd had the quantities of wheat mentioned in the receipts at the respective dates thereof, and they were in the warehouse when it was burned, on 18th March, 1867, and that he would not after he signed these receipts have let his employer have the wheat!

As to the alteration of the building, the pleas asserted an increase of risk, which was not sustained by the jury. The evidence shewed that a "lean to," joining the warehouse, was put up and finished by the 17th December, 1866. The risk commenced on that day. An elevator had also been put into the warehouse in the middle of January, 1867. The defendants' agent in Seaforth swore that when the plaintiff applied for insurance, he said, in reply to the agent, that there was no elevator and would not be one. The agent told him it would make a difference of one-half per cent. extra premium; that if plaintiff put one in he must let the agent know, as it might vitiate the policy, and there would be an extra rate; that when plaintiff applied for the second insurance he represented that the premises continued in the same state as when he

applied for the first. The application stated that the nearest building to the warehouse which contained the property insured was sixty feet distant: there was no mention of an elevator in the application, nor of the small building which the witness called a "lean-to." In the application it was stated that the policy was to be transferred to the Royal Canadian Bank as collateral security.

From the evidence it appears quite clear that Todd, on the 30th January, 1867, himself gave a warehouse receipt to one George Carter for 3,500 bushels spring wheat, and that there was not wheat enough in the warehouse to answer the receipt to Carter and the receipts (four in all) which had been signed by Coleman and endorsed by Todd to the bank; and for the defendants it was objected, that these warehouse receipts, being signed by Coleman, who was Todd's clerk, and not by Todd himself, were not within the Statute, and could not be effectually used to transfer Todd's right and interest to the bank; that if the receipts were void, the property continued to be Todd's, and had passed to Carter, to whom Todd had sold 3,500 bushels of wheat, which was all he had. Leave was reserved to the defendants to move to enter a nonsuit, and subject thereto the case went to the jury, who found for the plaintiff. A rule *nisi* was granted by the Court of Queen's Bench to enter a nonsuit, or for a new trial, and was, after argument, discharged. This appeal is consequently brought.

Owing to several changes which have taken place in this Court, the cause has been twice argued. It raises an important question in relation to warehouse receipts; though, but for the respect I have for the opinions of those of my learned brethren who differ from me, I should consider it as presenting no difficulty.

I entirely concur in the conclusion contained in the judgment of the Court below, upon the evidence of the quantities of grain in the warehouse during the times and at the dates contained in the four receipts signed by Coleman, in these words, "It is plain, therefore, that there

was what appears to have been a deliberate fraud in issuing receipts for grain in store, when there was not grain there to answer the receipts."

There is no doubt as to the position or occupation of Todd, or of Coleman. The former was a warehouse keeper, the latter was his clerk, who does not pretend to have been, or to have acted as, a warehouse-keeper: there is no ground in the evidence for even a surmise that he filled that character.

Then, as to warehouse receipts, what says the law? The Statute (22 Vic., ch. 54, Con. Stat. C.) gives a limited negotiability to "any receipt given by a warehouseman" for cereal grains, &c., "stored or deposited, or to be stored or deposited, in any warehouse," by enacting that such receipt might, by endorsement thereon by the owner of or person entitled to receive such grains, or his attorney or agent, be transferred to any incorporated or chartered bank, or to any person for such bank, or to any private person, as collateral security for the due payment of any bill or note discounted by such bank in the regular course of business, or any debt due to such private person; and, being so endorsed, should vest in the bank or private person from the date of the endorsement all the right and title of the endorser to such grains, &c.

There is nothing in all this affecting the business of the warehouse-keeper. That is left just where it was: the operation of the Statute is upon the receipt. I see no reason why a clerk of the warehouse-keeper, employed in conducting that business, might not bind his employer by signing receipts for grain, &c., delivered for storage, expressing, of course, in some way or other, that he was acting as clerk or agent for the warehouse-keeper, though the statute, by expressly authorizing the attorney or agent of the depositor, might be considered to intimate that, without it, only the owner or person entitled could endorse, and hence give rise to a question whether the warehouse-keeper must not sign every receipt intended to be endorsed or transferred under the Statute. As at present advised, I

think it would be a mere question of agency, in the business wherein the clerk was employed, not affected by the Statute.

Two years afterwards a second Act was passed to amend the foregoing one, by directing a further section or paragraph to be inserted and read as part of the section above stated. This paragraph is a proviso that where "*any person engaged in the calling of a warehouseman*" (the original Statute simply says "warehouseman," but I fail to see any substantial difference), is at the same time owner of, or entitled otherwise than as warehouseman to receive, such cereal grains, any such receipt *given* and endorsed by such person shall be as valid and effectual for the purposes of the Act as if the person giving such receipt and endorsing the same were *one* and the *same person*.

It was among other things argued, in the Court below, that the Statute does not require the person giving the receipt to be engaged in the calling of a warehouseman (see the report, 18 C. P. U. C. at p. 196), and *Smith's Mercantile Law*, 119; *Park v. Phoenix Assurance Co.* (19 U. C. Q. B. 110), and *Stevenson v. The London Assurance Co.* (26 U. C. Q. B. 148), were cited. It is sufficient to say that *Smith's Mercantile Law* does not touch our Statute, or profess to construe it; and neither of the cases referred to discusses or decides the point raised.

The receipts signed by Coleman profess to be under our Statute, but for which the Insurance Company would have no insurable interest by force of the respondent's endorsement; and the judgment of the Court below proceeds upon the assumption that the receipts were given under the Statute, and that the authority of Coleman, who was proved to be the clerk of the respondent in his business as a warehouseman, extended to the giving these receipts also.

It is not, as appears to me, going too far, if I assume that when a Statute gives a new and particular effect to receipts "given by a warehouseman, miller, wharfinger,

master of a vessel, or carrier," such a receipt, bearing only the name of him who signs it, and in no way directly or indirectly expressing or intimating that it is signed as clerk or agent for some third party, will be taken and construed as a representation that the signer is "a warehouse-keeper" or other person named in the Statute; and if there were no proof of authority in the signer, so to act for and bind the third party, being a warehouseman, &c., it would be wholly inoperative.

If it be assumed that Coleman's signature, just as it is, is an assertion on his part that he is a warehouseman, his own evidence clearly establishes the contrary. The respondent knew the untruth of the apparent representation, and nevertheless endorsed the receipt which contained it, having procured Coleman to sign the receipts. It is difficult to believe that Mr. Russell, the agent for the Royal Canadian Bank, did not know the actual positions of Coleman and the respondent when he discounted the latter's note on the faith of the receipts: it is much more probable that, the receipts being in the ordinary form of warehouse receipts between warehouseman and depositor for storage of grain, &c., he did not reflect upon the fact that Coleman was not the warehouseman, nor was the respondent putting wheat into *his* care for storage.

The receipts, then, and consequently the respondent's case, as trustee for the bank, can only be sustained by treating the signature of Coleman as amounting to the signature of Todd, who was the warehouseman, and asserted by those receipts that he was also owner of the wheat mentioned therein, then being in his warehouse. They are not valid and effectual unless they can be brought within the proviso.

I use the term proviso because of the language used, "Provided that where any person," &c. I consider it not as a mere legislative interpretation of the original clause, a declaration of its meaning, but as a new provision "engrafted" (to borrow the language of Bayley, J., 9 B. & C. 836) "on a preceding enactment," and to supply

something not therein expressed. The Statute, as originally passed, extended to certain classes as bailees. It required no Act of Parliament to enable an owner to pledge or to entirely dispose of his own chattel property; but to enable him, by a receipt, acknowledgement, or certificate, to assert his ownership, and then, by endorsement of such receipt, to vest his interest in that property in another, subject to a right to have it re-transferred to him, and in the meantime to continue in possession of it, would require a special enactment, owing to the apparent inconsistency with the Statute of Upper Canada respecting mortgages and sales of personal property. Now the language used enables the owner—being a warehouseman—to give a receipt or acknowledgment, or certificate, intended to answer the purposes of a receipt, such as a warehouseman would give under the original section; in other words, to make a written assertion of his ownership of the chattel property specified therein, and that it is deposited in his warehouse, or (perhaps) otherwise in his actual possession. But such an assertion of ownership, made for the sole purpose of enabling the owner to give a collateral security to secure payment of an advance of money by a bank or individual, cannot, I think, be properly assumed to be part of the duty or ordinary occupation of the warehouseman's clerk. I regard it as a personal privilege and to be exercised by the warehouseman himself, not as a part of the business of his calling, but for his advantage and accommodation as a dealer in grain, who is also a warehouseman. I think, therefore, he must sign as well as endorse the receipt, acknowledgment, or certificate.

It follows, in my opinion, that the attempted transfer of the wheat in question, as a collateral security, was not made, and that the bank having no insurable interest, the respondent cannot maintain this action for their benefit. I think, therefore, the rule to enter a nonsuit should be made absolute.

See *Paice v. Walker* (L. R. 5 Ex. 183.)

SPRAGGE, C.—The only question of *law* raised is, whether receipts, given by the clerk of a warehouseman in his own name, are within the statutes 22 Vic. and 24 Vic. The Act requires them to be “given by a warehouseman,” and the question is, whether a receipt, signed by the clerk of the warehouseman in his, the clerk’s, own name, but with the authority of the warehouseman, is a compliance with the Act. Upon principle and upon authority I think that it is. In the case of instruments under seal the rule is more strict; but a more liberal rule is adopted in what Mr. Justice Story, in his book on Agency (sec. 154), styles cases of “unsolemn instruments,” and especially of commercial and maritime contracts; and he states the doctrine established by modern authorities to be, “that if the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued and be entitled to sue thereon, and his principal also will be liable to be sued and be entitled to sue thereon in all cases, unless” the contrary be clearly manifested.

In a leading case upon this point, *Higgins v. Senior* (8 M. & W. 834) Lord Wensleydale, then Mr. Baron Parke, uses this language: “There is no doubt that where such an agreement is made, it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract, on the one hand, to, and charge with liability, on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds. And this evidence in no way contradicts the written agreement. It does not deny that it is binding on those, whom on the face of it, it purports to bind; but shews that it also binds another, *by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.*” This is in truth no more than an instance of the application of the maxim *qui facit per*

alium facit per se. There is nothing in the language of the statutes against this: "given" is the word used in both Acts; "receipt given by a warehouseman." So, the short question is, whether these receipts given by Todd's warehouse clerk are receipts given by Todd? I think they are. There is no question, nor any room for question, as to the authority of the clerk.

Upon the facts of the case and the finding of the jury upon them, the Court below appears to have exercised its discretion. My brother Wilson, by whom the judgment of the Court was delivered, says, "I do not see clearly how to interfere, either as to the identity of the wheat or the quantity of it as claimed by the bank, although I think the recovery in these respects rests on the most unsatisfactory evidence." In another passage: "I perceive many objections on the facts of the case; but they have all been investigated, and I do not know what service another trial would be, or how it could properly be granted when the cause has been fully and fairly tried." Under the Court of Error and Appeal Act, it does not seem to be open to this Court to review such exercise of discretion by the Court below. Section 26 runs thus, "Where the application for a new trial is upon matter of discretion only, as, on the ground that the verdict is against the weight of evidence, or otherwise, no appeal shall be allowed." It is true that in this case the application was upon other grounds also; but if in our opinion those other grounds fail, the circumstance of the application being upon other grounds, besides matter of discretion, cannot, I apprehend, open the door for reviewing matter of discretion, when but for those other grounds, in our opinion untenable, the matter would not be open. The plain meaning of the statute is, that matters of discretion are not appealable. Other questions, besides those to which I have addressed myself, were mooted in the Court below, but they were not raised in argument upon appeal.

My conclusion is that the appeal should be dismissed.

MORRISON, J., concurred with the Chief Justice.

WILSON, J.—The question is, whether the 9th and 10th pleas were proved? They alleged that neither the plaintiff nor the Royal Canadian Bank, the beneficial plaintiffs, was or were interested in the property insured, or in the policy, as alleged.

The answer to this question depends on whether the warehouse receipts for grain, under which the bank claim, are valid receipts under the statutes.

They were signed by Robert Coleman, who was not a warehouse-keeper, but a clerk of Todd's, who was the warehouseman; they stated that Coleman had, under the authority of the statutes, received so much grain in store for Todd as owner of the grain, which was to be delivered to Todd's order, to be endorsed thereon; and it was objected that the receipts were void because Coleman was not in fact a warehouse-keeper, and had not received grain for Todd; and that the receipts should have been signed by Todd himself, as warehouseman, in favour of himself, as owner.

As between Coleman, Todd, and the bank, the two former are concluded from denying that Coleman was a warehouseman, and that he duly received the grain in store for Todd, as owner.

The maker of a note is estopped from saying that the payee of a promissory note, payable to him or order, was incompetent to pass a title by endorsement: *Draton v. Dale* (2 B. & C. 293). The same rule applies against an acceptor: *Pitt v. Chappelow* (8 M. & W. 616). Nor can he deny that the person named as drawer drew the bill which he, the defendant, accepted: *Sanderson v. Coleman* (4 M. & G. 209), even though the name be a forgery, or fictitious: *Cooper v. Meyer* (10 B. & C. 468); nor can he shew his own alleged acceptance to be a forgery when he has acknowledged it as genuine, and an indorsee has taken it upon such admission: *Leach v. Buchanan* (4 Esp. 226); nor can an indorser to plaintiff, while admitting his own endorsement, deny the endorsation to himself: *MacGregor v. Rhodes* (6 E. & B. 266); nor can an indorser of a note

deny the making : *Free v. Hawkins* (Holts N. P. C. 550). The latest case on the point I have seen is *Phillips v. Im-Thurin* (L. R. 1 C. P. 463), where an acceptor, for the honour of the drawer, was held to be estopped from disputing the genuineness of the drawer's name, though, in fact, it was a forgery, as plaintiff had taken the bill on the faith of defendant's acceptance *supra* protest.

The case of *Pickard v. Sears* (6 A. & E. 469), and that class of cases, also plainly apply as between the three parties, Coleman, Todd, and the bank.

There was grain of Todd's in the warehouse when those receipts were given, and the bank took them in good faith, and advanced money upon them. On what principle then can it be said, as between these persons, that the grain specified shall not be a pledge to the bank for the money it had advanced ?

No satisfactory answer can be made against the claim of the bank, for it never can be contended that banks shall lose their pledges when the giver of such receipts is not in truth a warehouseman, though he has been put forward by the actual warehouseman and owner of the grain as a person filling that situation. Nor can it ever be contended that the same rules of law, which are applicable to other instruments, are not to be applied to warehouse receipts, nor that the beneficial doctrine of estoppel, which prevents so much dishonesty, when it can be applied, is to be excluded from all operation as to these documents, and as to persons dealing with them.

If there were no other facts than those I have just supposed, I cannot conceive how any doubt could arise against the just, full, and legal title of the bank, as against Coleman and Todd, in any kind of proceeding or suit, legal or equitable. There are, however, other facts in the case, but the question is, whether they make any difference.

The plaintiff, it appears, after the bank had got the two receipts of the 27th December, 1866, and the 10th January, 1867, gave to one Carter, on the 30th of January, a warehouse receipt for 3,500 bushels of grain, and, as the evi-

dence shews, after deducting Currie's quantity of 5530 bushels, there would only remain about 3,470 bushels of grain in store, at the time of the fire, to apply to the order of the person who was best entitled to it. The contest is between the bank and Carter.

The bank claim in respect of their earlier receipts: Carter claims in respect of the alleged invalidity of the bank title, on the ground, before stated, that Coleman was not a warehouseman, and that Todd, therefore, should have signed the bank receipts himself. I should rather say the Insurance Company set up Carter's title than that he does so; but what right have they to do so will require to be considered.

It is not pretended that any fraudulent or improper purpose was to be served by the receipts being given in this form by any of the parties, and certainly not by the bank: *Chandler v. Ford* (3 A. & E. 649); *Steadman v. Duhamel* (1 C. B. 888); *Whistler v. Forster* (14 C. B. N. S. 248); and if Coleman and Todd are bound by the estoppel mentioned, it is difficult to understand why Carter, who claims wholly by and through Todd, is not bound also, as an assignee and privy in the transaction.

The privies in law of Coleman and Todd would be bound, that is, their executors or administrators, and the rule equally applies to privies by estate. It would be extraordinary if Todd were bound by the receipts, and a subsequent vendee or pledgee from him were not bound; or if their assignees in insolvency could firstly take all the money the bank had advanced, and then take the pledge, too, on which it was advanced.

I think there is no such rule as this, and I am persuaded the receipt is good in itself, no fraud being intended by the form adopted; and that at any rate it was and is binding by estoppel, not only against Coleman and Todd, but against their assignees and privies, and against these defendants also. If it were open for Carter to contest the validity of the receipts to the bank, he has not done so.

The defendants, as insurers, have no right to set up a critical objection against the bank in support of his title,

without at all events showing they are doing so by his authority : *Thorn v. Tilbury* (3 H. & N. 534).

I do not conceive it to be necessary that the receipts should have been signed by Todd himself.

The statute, no doubt, speaks of the warehouseman, who is at the same time owner of the grain, giving and endorsing a receipt for the same, which "shall be as valid and effectual for the purposes of this Act as if the person giving such receipt, and endorsing the same, were not one and the same person;" but this was to confirm those documents, even when they were given in the absurd form of the warehouseman and owner of the grain acknowledging to himself that he had received so much grain in his own store for himself, when he had indorsed such documents to another person for value. It was not an Act of the Legislature declaring that the receipts must be and should be given in that form, when the owner of the warehouse and the owner of the goods was the same person.

A promissory note made by one payable to his own order, and endorsed by him in blank, is in law payable to the bearer. Until endorsement it is an informal instrument and not a promissory note at all; but by endorsement it becomes effectual as a note payable to bearer, or to such a person or order, according to the indorsement, whether it is in blank or special : *Hooper v. Williams* (2 Exch. 13). In this last case Parke, B., said, "Securities in this informal, not to say absurd form, are still not invalid, and it might be of much inconvenience if they were, for there is no doubt that this form of note, probably introduced long after the Statute of Anne, and for what good reason no one can tell, has become of late years exceedingly common; and it is obvious that until they are indorsed they must always remain in the hands of the maker himself, and so he can never be liable upon them."

I cannot believe that an instrument in so "absurd a form" as a receipt by a man to himself, was held by the Legislature so essentially necessary to transfer a valid title in law to a *bonâ fide* pledgee that such a form and no other should be within the protection of the statute.

The legal effect of such an instrument would be to give the person, who was indorsee in form, the rights of a receiptee direct, just as if his name had been originally inserted in the receipt.

It is better, therefore, so long as it is not in violation of the statute, and I think it is not, that the receipt should be signed by some one, as clerk or agent, in favour of the warehouseman, when he is owner of the goods, in order to avoid the absurdity of the receiptor receipting to himself, which is manifest nonsense, and which calls for an endorsement to make it of any use. At any rate it is not absolutely necessary, in my opinion, to adopt a form that has neither sense nor convenience in it. Nor should we be obliged to hold that a title free from so absurd a form must necessarily be bad in law.

The statutes in question were not passed to give conveyancing or mercantile forms of documents, but to provide for dealings with respect to well known instruments. Their purpose is declared in the preamble to the original Act, passed in the 22nd Vic. ch. 20, to have been "for affording additional facilities in commercial transactions," and they should be construed accordingly.

The observations in 2 *Wms. Saund.* 96 *b*, in the notes, as to the construction of deeds, are applicable to these statutes: "The chief intent of the parties is to pass the estate, and the method of doing it ought to be subservient to that end."

And in *Meyerstein v. Barber* (L. R. 2 C. P. 55) Willes, J., said: "Then we come to the Act of Parliament and see what was its object. It professes to be dealing with the interests of ship owners and shippers of goods and their consignees, and not with the effect of mercantile instruments. I cannot suppose that the Act of Parliament, which contains no express provision for the purpose, and in which I find no necessary implication of such a purpose, intended to weaken or destroy the rights of holders of bills of lading, or to render those instruments less capable of being dealt with than they were before. I entertain no doubt that the Act leaves the rights of the parties just as they were."

No argument can be raised as against banks, which were prohibited from dealing in such articles, and which they are now authorized to deal in only by virtue of these statutes, for the same language is used in these Acts with respect to "private persons" as well as to banks. And I do not expect to have it argued that such receipts as are now in question would be void as against a *bonâ fide* private pledgee. I mean private in the meaning of the statute, as opposed to a bank being pledgees.

The statutes, it will be observed, do not say that the receipts shall be *signed* by the persons therein mentioned, but only that they need be *given*.

Now, if the person giving and indorsing be the same, we have a literal compliance with the statute.

The question then will be whether Todd can be said to be the person who *gave* the receipt, though it was signed by Coleman, and in Coleman's name.

The master of a vessel usually signs the bill of lading in his own name; yet the owner may be sued upon it as well as the master. *Hunter v. Prinsep* (10 East. 390); *Abbott on Shipping* (100, 102, 11th ed.), and numberless other authorities shew this. An agent agreed to sell in his own name, which was contained in the sold note; yet his principal was held liable upon it.

Lord Denman, C.J., said in *Trueman v. Loder* (11 A. & E. 594), "Parol evidence is always necessary to shew that the party sued is the person making the contract and bound by it. Whether he does so in his own name or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are enquiries not different in their nature from the question, who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."

In *Lindus v. Bradwell* (5 C. B. 583) a bill was drawn on William Bradwell, the husband. His wife accepted it in her own name, "Mary Bradwell." This was held to be a

good acceptance to bind the husband. Maule, J., said : "The husband, in effect, says the wife was authorized by him to accept bills in that way. If a man says to his wife, 'accept such a bill drawn upon me in your own name,' unless he means to be bound by that, he means nothing. Suppose the drawee, with his own hand, accepts the bill, by writing another name across it, will he not be bound? There the defendant has, by the hand of his wife, written 'Mary Bradwell' on the bill. If he had done that with his own hand, it clearly would be his own acceptance, and I know of no such law that makes such an authority void. He has accepted it by and in the name of his wife."

In *Jones v. Littledale* (6 A. & E. 490) Lord Denman C. J., said, in a case where the agents were sued, because they had professed to sell in their own names: "There is no doubt that evidence is admissible, on behalf of one of the contracting parties, to shew that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." See also *Sims v. Bond* (5 B. & Ad. 389); *Garrett v. Handly* (4 B. & C. 664).

In *Higgins v. Senior* (8 M. & W. 834, 844) Parke, B., said: "There is no doubt that where such an agreement is made it is competent to shew that one or both of the contracting parties was an agent, or were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract, on the one hand, to, and charge with liability, on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shews that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal."

I may also add *Schmaltz v. Avery* (16 Q. B. 655); *Humfrey v. Dale* (7 E. & B. 266, affirmed in Exch. E. B. & E. 1004); *Smethurst v. Mitchell* (1 E. & E. 622); *Wake v. Harrop* (6 H. & N. 768, affirmed in Ex. Ch. 1 H. & C. 202).

It appears to me upon these, and many other cases which might still be added to them, that under the name of "Robert Coleman," to these receipts, Todd might have been charged, as the person who gave them, in his own name.

These statutes should not be narrowly, but liberally, construed, so as to bring them into conformity with the well known law and usage of England and the adjoining Republic, with which countries we deal so largely; for the provisions of the Acts are not confined to the Province, nor even to the Dominion [see Dominion Act 31 Vic. ch. 11, sec. 7], but extend to goods which may be imported into the Province, "from any place whatever, to any part of the Province; or through the same, or on the waters bordering thereon, or from the same to any other place whatever."

If the statute be rigidly and literally construed, it would exclude a bill of lading, which had been given by the owner of a vessel, from being endorsed in security for an advance of money, because the Act does not name the owner, but the master only of the vessel. Yet this could never have been the object of the statute.

It is true the master commonly signs the bill of lading, but the owner may do so: *Abbott on Shipping*, 11 ed. 100, 102. If the owner can be sued on the master's signature, as he unquestionably can be, it must be because the master's name in law represents the owner's name; and if so, the owner may certainly attach his own name, or any other authorized agent may do so for him.

In *Collier v. Hinde* (17 L. J. N. S. 341) the master, or the purser, it was provided, might affirm to the bills of lading.

In *Jessel v. Bath* (L. R. 2 Exch. 267) an agent of the owner signed the bill of lading in place of the master. In

my opinion, then, the bill of lading which is not signed by the master, but by the owner, or by any other authorized person for the owner, may be endorsed as a collateral security for the repayment of an advance made upon it, and will be as available under the statutes to the pledgee as if the master himself had signed it.

This case is not within the words, but it is within the purview and spirit of the Act. Indeed, if the Act be construed literally, it must be the warehouseman, miller, wharfinger, master of a vessel, or carrier, who is to give the bill of lading or receipt himself, and he cannot act by clerk or agent, and this view derives much force from the fact that, while no provision is made for any of such persons acting otherwise than in person, express provision is made for the receiptee or indorsee of the bill of lading endorsing the same by himself, "or by his attorney or agent."

Nowwithstanding all these reasons in favour of the beneficial plaintiffs, and to which I attribute very great, but I hope not undue, weight, and which I think maintain their right on that construction of law, they are not entitled to succeed if the majority of the Court, as I believe it is, is against their right of recovery.

I feel an insuperable difficulty in giving any effect whatever to the exceptions taken in favour of the defendants. They are bound to make good the loss if the bank had an insurable interest; and they had such an interest, though they had not a strictly formal instrument endorsed to them, if they could by proceeding in equity have compelled the execution and delivery of a more formal document.

Now this they could certainly do if no other rights intervened, and Carter's is the only right which could be set up against the relief. But if he took with notice of the bank claim, and if the same rule applies in such a case as to notice with respect to the execution of a contract relating to chattels which applies to land, he could not successfully resist the relief sought, the perfection and completion of the warehouse receipts. Whether he had such notice or

not does not appear; but the verdict is against the defendants, and they have not asserted Carter had not notice. The presumption therefore is, that the verdict is right in this respect, and that Carter had notice of the bank title.

There are other cases pending in the courts below on the effect of warehouse receipts, given not in strict compliance with the statute, which make it a matter of great concern how such documents, and the statutes bearing upon them, are to be construed. This was written so long ago that the cases referred to have been appealed and disposed of in Appeal, while this case remained over.

It has been asked whether Coleman, who signed these receipts, could be prosecuted criminally under the wording of the 10th section of ch. 54, if the receipts were false.

That section provides that sections 68, 69, and 70, of ch. 92 shall be applicable to all false bills of lading, receipts or documents in the 8th section of ch. 54 mentioned; and any person or persons knowingly giving, accepting, transmitting and using the same, shall be subject to the pains and penalties imposed by sections 68, 69 and 70 of ch. 92, in respect of the receipts therein mentioned.

Or, whether he could be prosecuted under the 24th Vic. ch. 23, sec. 1, for a misdemeanour contrary to the section of ch. 92.

The Act of 1861 provides that the wilfully making any false statement in any such receipt, &c., shall be a misdemeanour, punishable in like manner as any misdemeanour in section 68 of ch. 92.

I see nothing to prevent Coleman being punished, if the receipts he gave contained any wilfully false statement.

Section 10 of ch. 54 enacts that *any person or persons* knowingly giving, &c., a false receipt, &c., shall be liable to be punished under ch. 92.

This language is especially applicable to the view I have expressed as to the purpose, object, and construction, of the statute, and is quite opposed to the limited interpretation which is attempted to be given to it. And so also is the language of the Act of 1861; for that Act merely says,

“and the wilfully making,” &c., which is plainly equivalent to the making “by any person or persons,” as mentioned in ch. 54.

In turning, then, to section 68 of ch. 92, the language there is, “If the keeper of any warehouse, * * agent, clerk or other person employed in or about any warehouse * * knowingly and wilfully gives to any person a writing purporting to be a receipt for, or an acknowledgement of, goods or other property, as having been received in his warehouse, or in the warehouse in or about which he is employed * * before the goods or other property, named in such receipt or acknowledgement, have been actually delivered to him as aforesaid, such intent to mislead, deceive, injure or defraud any person or persons whomsoever, although such person or persons may be then unknown * * the person giving * * such receipt or acknowledgement shall be guilty of a misdemeanour.”

The provisions of the Act are precise when creating a crime and declaring in what it shall consist, and who shall be the offenders, because that was its object; and it is there declared that not only the keeper of a warehouse, but the *agent, clerk, or other person, employed in or about any warehouse*, shall be liable to punishment if he contravenes the statute.

Now, this provision as to agents, clerks, or other persons, corresponds with section 10 of ch. 54, which provides for offences committed by *any person or persons*, and corresponds also with the general language of the Act of 1861; and they all confirm the argument that ch. 54 was meant to apply to agents, clerks, and other persons, employed about warehouses, as well as to the keeper of the warehouse. And it is notorious that the most of such business is transacted by agents and clerks; and to construe a statute so as to exclude all agents, clerks, or other authorized persons, even by direct procuration, from acting and giving warehouse receipts, when it was not the object of the Act to declare what class of persons should give them, but merely that such documents, well known in trade, might be made

more convertible, is to defeat the declared object of the Legislature to afford greater facilities in commercial transactions, and to impose a construction on the Act, in my opinion, not warranted, and which can answer no other purpose than to cramp and embarrass trade. This test of the criminal irresponsibility of an agent or clerk, who gives a false warehouse receipt, quite fails for the purpose for which it has been used, and adds another ground for the liberal interpretation of the statute, which I believe to be the correct one.

In my opinion, as Todd and Coleman were estopped from disputing the validity of these receipts, Carter and the defendants are estopped also.

The defendants are not at liberty to set up any opposing claim to that of the bank on so critical an objection, as they do not shew that Carter, the other claimant, has set up any adverse claim, or that they are setting up this *jus tertii* by his authority, or that he could do so himself.

The receipts were *given* by Todd, though signed by Coleman. The signature by Coleman, the clerk, is a sufficient signature in fact and in law to bind Todd, the principal. Coleman's signature in his own name may be averred to be the signature of Todd; and it was for the jury to say whether Todd was bound by that name or not.

The banks are entitled to maintain their verdict by any means they can, and they may now insist, if the question, whether Coleman's name did or did not mean such a signature as to bind Todd, were not put to the jury, as a fact to be found by them, that it was the defendant's fault it was not so put, or that it may now be presumed the jury found the fact, as they might have done in law, affirmatively for the bank.

The bank had at any rate an insurable interest in the grain as against the defendants; and Coleman would not be free from criminal responsibility if the receipts in question were shewn to have been given by him in contravention of the statutes.

From the result at which I have arrived, the appeal on

the legal questions should be dismissed ; and on the facts, also, I may say, there are no special reasons which entitle the defendants to succeed ; for the bank, who are really the persons solely interested, are in no way to blame for the fraudulent practices of Todd. The bank and the insurance company are on a footing in this respect. The company have got the premium on their policy ; the property was destroyed by fire : they are bound to pay unless they can clearly exonerate themselves. I do not see on what ground, either on the facts or on the law, they can be relieved from their contract.

MOWAT, V. C.—The principal question is whether, where a warehouseman is the owner of the goods, the receipt must be signed by himself personally. That a receipt signed by his clerk or agent, by his authority, is sufficient under the Statute, where another is the owner of the goods, does not seem to be disputed in the defendants' reasons of appeal, and is, I apprehend, indisputable.

Bills of lading, and receipts by warehousemen, wharfingers, and carriers, had long been in use, and were well known instruments in trade at the time the first Statute in question was passed ; and such instruments did not require the signature of the warehouseman, wharfinger, or carrier himself, in order to give to them 'validity or effect for any purpose for which, as the law stood, they could have been used : the signature of a clerk or agent was quite sufficient. Our banks could not take security on goods ; and as to private persons, though the property in goods mentioned in a bill of lading passed by endorsement of the bill of lading, the effect was different in the case of the receipts of a warehouseman or wharfinger, a distinction with respect to which I may refer to Mr. Justice *Blackburn's* book on Contract of Sale, p. 302, and to *Glass v. Whitney* (22 U. C. Q. B. 290). In that state of the law, the Statute 22 Vic., ch. 20 (1869) was passed, placing such receipts on the same footing as bills of lading as to the effect of an endorsement in passing the property in the cases and for

the purposes which the Act specified; and the Act placed banks on the same footing as private persons in regard to the right of taking transfers of both bills of lading and receipts, as collateral security for bills and notes discounted in the regular course of business at the time of taking such transfers. The Act (Consol. Stat. C. ch. 54, sec. 8) applies to "any bill of lading, any specification of timber, any receipt given by a warehouseman, miller, wharfinger, master of a vessel or carrier;" and a receipt signed by a clerk or agent, and delivered by the warehouseman, &c., is as truly "given" by the warehouseman, &c., as if he had signed it himself. The Statute says nothing as to the form of the bill of lading or of the receipt, or as to the mode of authenticating either instrument: it leaves both those matters as they stood before the passing of the Act, and, so far as banks and bills of lading are concerned, merely extends to the banks certain rights which already belonged to private persons. It is a general rule that oral evidence is admissible to shew that either party to a written contract was an agent only, and, on that fact being established, the writing binds the principal; and on the other hand, he is entitled to sue upon it in his own name. Some of the cases illustrating this rule are collected at pages 600 and 604, of the 6th edition of *Addison on Contracts*. The maxim, "*Qui facit per alium facit per se*," on which the doctrine depends, has been judicially said to be of almost universal application; and that the rule, as I have stated it, applies to bills of lading and the like, was expressly stated by Lord Abinger in *Beckham v. Drake* (9 M. & W. 90). It seems to me, therefore, to follow clearly, on principles of construction which we constantly act upon, that bills of lading and receipts under the Acts in question must be held to form no exception to the rule.

Though the accuracy of this conclusion is not questioned, where the bill of lading or receipt relates to goods of third persons, its correctness is denied where the goods are the property of the warehouseman himself. But I see nothing

which enables me to make that distinction. The Act 24 Vic., ch. 23 does not say anything about the form of the instrument, or about its being signed, any more than the previous Statutes did. That Statute enacts that the first section is to be "inserted at the end of and read as part of the eighth section of the" previous Act; and the addition to be so made to the former enactment begins thus: "Provided that where any person engaged in the calling of warehouseman, miller, wharfinger, master of a vessel, or carrier, by whom a receipt may be *given* in such his capacity as *hereinbefore* mentioned * * * is at the same time the owner of, or entitled himself, * * * to receive such * * * goods * * * ,—any *such* receipt, or any acknowledgment, or certificate intended to answer the purpose of such receipt, shall be as valid and effectual for the purposes of this Act, as if the person giving such receipt, acknowledgment, or certificate, and endorsing the same, were not one and the same person." I can see no reason for saying that the receipt referred to in this so-called proviso is not precisely such a receipt as was intended and contemplated by the original enactment to which the proviso is directed to be appended.

If I am to look, not merely at the language employed, but at the reason of the thing, I would say that, if a receipt, with respect to the goods of a stranger, may be signed by the clerk or agent, *à fortiori*, may a receipt which refers to the goods of the warehouseman himself be so signed; for the chance of fraud on the part of the warehouseman and owner must be diminished by the intervention of a third person, as the clerk or agent. In such a case an endorsee has the guarantee of the agent, as well as of the principal, that the goods are in store; and if the goods are not there, both agent and principal are criminally liable.

It was said in argument, indeed, that there was no penalty for merely endorsing a false receipt, but only for signing a false receipt. But that is a mistake. It is made a misdemeanor to wilfully alienate or part with goods men-

tioned in the receipt; and also knowingly and wilfully to accept, transmit, or use, a false receipt; so that it is clear that the warehouseman would not escape criminal responsibility by getting his clerk to sign a false receipt, and by confining his own part to endorsing it. I think, besides, that if a warehouseman *give* to a third person a false certificate under the Consolidated Statute, of having received goods of such third person, he should be held criminally liable, though he may have got his clerk to sign the certificate instead of signing it himself.

I think, also, that the receipts were sufficiently endorsed within the meaning of the Statute. The term "endorsed" is one with which, long before the Statute, commercial persons had been familiar in reference to bills of lading and warehousemen's receipts, as well as to bills of exchange and promissory notes; and the receipts now in question were endorsed in a way sufficient to pass the property comprised in such documents so far as it could have been passed in that way before these Statutes. I refer to *Short v. Simpson* (L. R. 1 C. P. 248) and *Meyerstein v. Barber* (2 *Ib.*, 38), and S. C. in appeal (661), for cases on that point. I do not think that there was any intention on the part of the Legislature to require some other method of endorsing, which commercial men were not familiar with, and which the Statutes did not specify. It was said that, as the banks could only take transfers of goods as collateral security for bills and notes discounted as the Acts mention, the legality of the transaction should appear by the terms of the endorsements; but no authority was cited for this contention. The Courts do not presume that transactions which might be legal or illegal belong to the latter class, but the contrary. Thus, corporations are often restricted as to the purposes for which they can take and hold real estate; and if it appears from a conveyance that it is taken for an unauthorized and illegal purpose, the deed would be void; but, on the other hand, it is unnecessary, in order to its validity, that the conveyance should state on its face the purpose for which the land is required.

See *McDonell v. Bank of Upper Canada* (7 U. C. Q. B. 277, 278, 287, 290).

As to the remaining points which were argued on the appeal, I shall state the conclusions merely at which I have arrived. I agree with the Court below, that, in the absence of fraud, the oral evidence of what, at the time of the plaintiff's applying for the insurance, took place on the subject of an elevator, cannot be permitted to vary the rights of the parties under the policies. The argument that, as to the increased risk which the erection of an elevator involved, and as to the quantity of wheat in store, the verdict was against the weight of evidence, was for the Court below to consider; and their refusal to grant a new trial on that ground is not appealable. The question of salvage was not taken in the Court below.

The result is, that, in my opinion, the judgment of the Court of Common Pleas was right, and should be affirmed.

GWYNNE, J.—In a recent case in the Court of Common Pleas, *The Bank of British North America v. Clarkson*, I have expressed my opinion, to which I still adhere, that inasmuch as the Legislature has thought fit to permit Banks to acquire an interest in property under instruments termed "Warehouse Receipts," "acknowledgments," or "certificates," subject to certain conditions, and not otherwise, we have no right to relax those conditions, or to say that a mode of effecting the object permitted by the Legislature, different from that directed by the Legislature, shall be equivalent to that which the Legislature has directed.

I am of opinion that the instruments in this case do not come within the Statute, and so that the Bank acquired no property in the wheat in question in virtue of them; although I think that a warehouseman may sign the certificate by his attorney or agent as the owner may endorse it by his attorney or agent; still I think the signature appearing on the receipt should be expressed to be that of the warehouseman, by himself, his attorney, or agent, as the

indorsement should be that of the owner, by himself, his attorney, or agent.

If the name of a warehouseman is set to one of these receipts, by his clerk or agent, it would be proper to adduce evidence to shew, if the occasion should require it, that such person representing himself to be such agent, had or had not authority to sign the name of the principal; but where, as here, the name "Robert Coleman" simply is signed to the receipt, thereby professing to be the warehouseman, it was not competent, in my judgment, for the plaintiff to adduce, or for the Court to receive, evidence that he was the agent of the person named in the receipt as the owner, and that in truth such owner was also the warehouseman, so as to establish by parol testimony, contrary to what the receipt shewed upon its face, that the owner and the warehouseman were one and the same person.

Upon the face of this receipt it purports, in my judgment, to be a receipt under 22 Vic. ch. 54, and not under 24 Vic. ch. 23; that is, to be a receipt given by one person to another person: it goes forth into the world with an assurance that a purchaser has the guarantee of a bailee of the property irrespective of the owner. Notwithstanding this profession upon its face, evidence was admitted to establish that Coleman, the ostensible warehouseman, did not fill that character, but was clerk of Todd, who was both owner and warehouseman, and so it was held that the receipt, contrary to the profession it bore upon its face, was a receipt within 24 Vic. ch. 23, that is, given and endorsed by one and the same person. Parol testimony was thus received for the express and sole purpose of contradicting the written instrument, an instrument of a commercial character, in which verity upon its face is, in my opinion, most essential.

It appears to me that these instruments, intended to have a commercial value, should present upon their face the undoubted verity and incontrovertibly shew, without recourse to any extrinsic evidence, whether they are intended to operate under 22 Vic. ch. 54, or under 24 Vic. ch. 23; or,

taking these two Statutes together, the former containing the body of the clause, and the latter a proviso as in 31 Vic. ch. 11, whether they are intended to operate as an instrument having validity under the clause or under the proviso.

It appears to me of vast importance that every purchaser, into whose hands these instruments may come, should be informed by the instrument itself whether he has the security of a bailee independently of the owner, or only of the owner: the knowledge of that fact may very materially affect his conduct and vigilance.

STRONG, V. C.—I am of opinion that the principles of construction applied by this Court to the Statutes relating to warehouse receipts, in the case of the *Royal Canadian Bank v. Miller* (28 U. C. R. 593), make it imperative upon the Court now to determine that the receipts in question in the present case passed no property to the bank.

In my judgment, section 1 of 24 Vic., ch. 23, upon the true construction of which the validity of these receipts entirely depends, only gives efficacy to a receipt by a warehouseman in his own favour where the instrument is *actually* signed upon its face and endorsed by one and the same person; in other words, the word “given” is used as an equivalent for “signed.”

I think that the Legislature could not have expressed more strongly than they have in this enactment their intention only to make valid instruments which should appear, upon mere inspection, without further enquiry, to be of the anomalous character referred to, viz., receipts by a warehouseman in his own favour.

I found my decision upon the words of the Act, taken in their literal signification, and I do not think the Court are at liberty to speculate as to the intention of the Legislature, apart from the expression of it to be found in the Statute.

The rules for the interpretation of Statutes, which are well stated in *Miller v. Salomons* (8 Exch. 778), and in

the judgment of my brother Gwynne, in *Bank of British North America v. Clarkson* (19 U. C. C. P. 182), with reference to these same Statutes, require this.

I cannot, however, forbear from saying that, even if the question of convenience was open to consideration, it would appear to be a dangerous conclusion to come to, to hold that a receipt might be given by a warehouseman's clerk in his master's favour, on its face appearing to be a good receipt under the first Statute, which, by parol evidence of the receiptor, being the clerk of the receiptee, might be transmuted into a receipt good only under the 23rd Vic. So to determine would, I think, tend to facilitate the practice of those frauds which experience has shewn to be too common in that class of commercial transactions in which property in merchandise passes, not by actual delivery, but by documentary transfer. It was not open to the plaintiff, after having abandoned the point at the trial, to contend that he can support his action by shewing a beneficial interest in himself.

I think the rule should have been made absolute for a nonsuit, and that this appeal ought to be allowed.

Appeal allowed.

COFFEY ET AL. V. THE QUEBEC BANK.

Sale of grain—Warehouse receipt—Evidence of appropriation—Conversion—Trover.

Held, under the facts detailed in the *head-note* to this case, *ante* p. 110, and affirming the judgment of the Court of Common Pleas, Spragge, C., and Strong, V.C., dissenting, that there was sufficient evidence to go to the jury of an appropriation of the wheat by the vendor to the vendees, and that the jury were justified in so finding.

APPEAL from the judgment of this Court, *ante* p. 110, where the pleadings and facts are stated.

The ground of appeal was that there was no evidence of any such property in the plaintiffs as would enable them to maintain trover, the respondents, besides contro-

verting this ground, contending that the defendants were wrongdoers and could not, as against the will of the plaintiffs and their vendors, set up the want of a specific appropriation of the wheat.

Anderson for the appellants, the defendants (a). A warehouse receipt does not differ from any other document, so far as regards the Statute of Frauds: *Blackburn Contract of Sale*, 123; per Hagarty, C. J., in this case below; *Aldridge v. Johnson*, 7 E. & B. 885. In this case, if there was no evidence on which a jury could reasonably find an appropriation, there should have been a nonsuit. The finding of the jury cannot affect this question.

Kennedy, on same side. This is not a transaction within the Statute: it was not an *advance of money secured* by indorsement of a warehouse receipt.

M. C. Cameron, Q.C., contra. The warehouseman becomes agent for the buyer the moment the seller notifies him that he has sold. The wheat in the lower bin was set apart for plaintiffs, and whatever it contained was appropriated to them.

Anderson, in reply. According to the argument on the other side, a right to elect would be acquired by the purchaser. The warehouse-keeper, if agent, did not appropriate.

Sept. 3rd, 1870.—DRAPER, C. J. of Appeal, delivered the judgment of the Court.

Treating this case on the simple question raised at the trial, by way of objection to the charge of the learned Judge who presided, that there was no evidence to go to the jury of appropriation, without which the property in the wheat would not vest in the respondents, I am of opinion the appeal should be dismissed.

(a) The case was argued, 30th June, 1870, before Draper, C. J. of Appeal, Richards, C. J., Spragge, C., Morrison, J., Gwynne, J., Galt, J., Strong, V. C.

There is no dispute between the vendor and the vendees. The former, examined as a witness, proves that he sold 2000 bushels of wheat to the respondents, and was paid in full for it, and that, holding a receipt for that quantity for wheat previously stored by him in Scott's warehouse he endorsed that receipt thus : " Deliver to L. Coffey & Co." (the respondents), " or order, in store." He swears that at the time he transferred the receipt the wheat was his property. He told the warehouseman of the sale, and directed him to give the respondents the wheat in the lower bin, that is, in the north-western corner of the storehouse No. 2.

The warehouseman proves the same receipt, and that the wheat mentioned in it was in his warehouse when he gave the receipt, and that it was mixed with the other fall wheat which had been stored by Taylor, the vendor, but that no other fall wheat was mixed with it after Taylor had informed him of the sale and directed him not to mix the wheat in that bin. He stated that, in the warehouse referred to in the receipt, there were six bins, three on the lower floor; that in Nos. 1 and 2, north-west bin and passage" (meaning, as I understand, that No. 2 was the passage), there were 3000 bushels; in No. 3, 5000 bushels, afterwards proved to be barley. The wheat in the receipt was in bins Nos. 1 and 2. The other three bins were upstairs. He states distinctly that Taylor directed him to furnish and deliver to the respondent 2000 bushels out of the wheat in bins Nos. 1 and 2.

The evidence of this witness leaves no room for a doubt that, after receiving these directions, he agreed and undertook to hold the 2000 bushels, mixed as they were, for the respondents, or any other holder of the receipt which he had given to Taylor for that quantity.

I think it also established, though not stated in express terms, that Taylor delivered the receipt, endorsed with the order to deliver, to the respondents, when he received payment for the wheat. It was produced on their part, and shewn to Taylor when he was examined on the commission. He swears that he " endorsed the warehouse

receipt to " the respondents, and received the money. It was in the possession of their attorney when he, on their behalf, demanded the wheat of the respondents' agent, and it was refused to him.

In the face of this receipt, of the fact of payment and his direction to the warehouseman, Taylor could not be heard to assert any continuing ownership of this wheat; and no other persons but the respondents could, upon the facts proved, have any claim to it. The appellants have not attempted to justify their taking the wheat, by asserting any right to it.

The ordinary course of business in such transactions, as to wheat stored during winter in a warehouse at a port of shipment, is to leave it there, though it may be transferred from one purchaser to another, until the opening of the navigation. Assuming this to have been the intention of the respondents, they had no motive, after the warehouseman had agreed to hold the 2000 bushels for them, to procure the separation of the 2000 bushels until the time for shipment arrived. Both Taylor and Scott left this Province about the 9th March, 1869, after which the appellants seized the grain.

I think the jury were warranted, on all these facts, in finding as they did, "that there was a specific appropriation of the wheat," so far as Taylor was concerned. I think, also, that these facts supply evidence proper to be left for the jury, that the respondents had assented to the appropriation as it was made. Suppose that the 3000 bushels of wheat had been, after all this, seriously damaged or destroyed; could the respondents have claimed compensation from Taylor? I do not think they could, if a jury sustained the appropriation and their assent to it, though the 2000 bushels were not separated.

Most probably the finding of the jury in this case was influenced by a consideration of the injustice of the appellants' proceedings, in taking away the wheat in disregard of the respondents' rights, and they were satisfied with slighter evidence than they might have required if

the appellants had shewn any justification for their proceedings. I am not concerned with that consideration. I have only to say whether there was any evidence to go to them. I am of opinion that there was.

Nevertheless, I think it is to be regretted that the respondents did not give evidence of the common course of dealing in the business of warehousing cereal grains, which appears to be, that he receives such grain to be stored, subject to the order and disposal of the parties delivering it, giving to each party a written acknowledgment of the receipt, which acknowledgment is usually termed a warehouse receipt: that, unless under special circumstances, or under special agreement, the grain so delivered is mixed with grain of similar quality and character, which has been, or may be, from time to time brought to be stored, so that the identity of each parcel of grain is lost: that these receipts are treated as an undertaking by the warehouseman to deliver to the holder thereof, that is, the person named therein, or to any other person to whom he may, by endorsement or delivery order, transfer the right to receive such grain: that such endorsement or delivery order entitles the holder to receive the specified quantity of grain of the like quality and character as that mentioned in the receipt.

It may be added that this practice of storing grain and of treating the transfer of the warehouseman's receipt as a transfer of the right and interest in the grain, is, under certain circumstances, expressly sanctioned by our Statute.

The practice of mixing grain stored, and of treating the holders of the receipts for the several parcels delivered as owners of the aliquot parts of the whole mass so composed, might, I have no doubt, have been clearly proved. In cases already before our Court, it has been proved and acted upon. Analagous evidence was given in the *South Australian Insurance Co. v. Randell* (L. R. 3 Pr. Co. App. 101), to prove a local usage of trade, and was acted upon by the Court.

Assuming this practice to be a matter which this Court can notice, it would be manifestly and unnecessarily inconvenient that on every sale by the owner, holding the usual receipt for grain stored in a warehouse, the quantity sold must be severed from the general mass, although the purchaser did not require it, and did not at the time being intend to take it away ; in which case the severed portion might, and probably would, be remixed with that from which it had been taken. The endorsement, as in the present case, and a proper notification of it to the warehouseman, and his assent to treat the new holder of the receipt as possessing the right of the original depositor, such holder being willing to accept it as it lay, would, it appears to me, be sufficient to transfer the right and interest of the vendor in the specified quantity of grain, without severance from the mixed heap and then mixing it again. A difficulty might be suggested where one proprietor owned all the wheat out of which the aliquot part was to be taken. It does not, however, seem to me that, if the principle be admitted, it would not equally govern such a case as one in which a large parcel of wheat mixed together belonged to several owners, one of whom transferred his right and property to a purchaser ; and this must be a common occurrence where farmers bring in their wheat to be warehoused, each taking his receipt for his quantity, and all the quantities are mixed together.

We are content, however, to rest our conclusion that the appeal should be dismissed on the first ground. The evidence sufficiently shews that about 3000 bushels of wheat were deposited by Taylor with Scott, a warehouseman, for which Scott gave him two warehouse receipts, one being for 2000 bushels, which receipt Taylor delivered to the respondents, having first endorsed on it a delivery order in their favour. Taylor informed Scott of the sale, and directed him to keep these 3000 bushels unmixed with other wheat, in order to deliver to the respondents 2000 bushels thereof. Taylor was paid in full, and the appellants knew this, and he deposited the price to his credit

with them, and got from them the very receipt which he then transferred to the respondents. Scott followed the directions given him and held the 3000 separate, subject to the respondents' claim for 2000. After all this the defendants took the 3000 bushels, and disposed of them.

On these facts, we are of opinion that the warehouseman was estopped from denying that the property in an undivided 2000 bushels of the 3000 had passed to the respondents; that Taylor was estopped from denying that he had transferred his right in them to the respondents; and that, if necessary, the jury might and ought to have presumed that Taylor and the respondents were tenants in common of the whole quantity in their respective proportions. See *Harper v. Godsell* (L. R. 5 Q. B. 422).

The act of severance was, when called for, to be performed by the warehouseman, who became the bailee of vendor and vendees; for Taylor, having been paid, had no interest remaining in himself, except for his undivided share. The defendants are, therefore, guilty of a conversion of the respondents' 2000 bushels.

I observe in the *Weekly Notes*, of 2nd July last, that a case of *Knights v. Wiffin* has been recently decided, which throws much light on the effect of a delivery order for grain accepted by the keeper of the warehouse where it is deposited.

The case of the *South Australian Insurance Co. v. Randell* (L. R. 3 Priv. Coun. App., 101,) contains some observations that have an important bearing on the present appeal. The plaintiffs were millers in South Australia. They were in the custom of receiving wheat from farmers, who were aware of their course of business, which wheat was emptied from bags into hutches or bins, where it became mixed with other wheat which had been received in a similar manner, and on part of which the plaintiffs had made advances to the farmers. The wheat thus mixed lost its identity, and became the current stock of the plaintiffs, which, as was known to the farmers, the plain-

tiffs sold as wheat or ground in the mill at their pleasure. It never was intended that the identical wheat should be restored to the farmer who brought it. On delivery, the plaintiffs gave the farmer a receipt in these terms: "Received, &c., to store," and it was shot or emptied, to be stored or taken in storage. The farmer could at any time demand an equal quantity of wheat of like quality of that delivered, or the market price of an equal quantity, fixing the price as of the day on which the demand was made. The plaintiffs had the option of delivering wheat of like quality, or of paying such price. The plaintiffs frequently made advances to farmers in respect of wheat so delivered. No charge was made in respect of the wheat for a certain time, after which storage of one farthing per bushel per month was made. The Judicial Committee held that these transactions amounted to a sale by a farmer to the miller, and entitled him to claim upon a policy of insurance against fire as for his own property, although such wheat was not specifically insured or described as "goods held in trust and on commission," the condition on which the defence was rested.

In delivering the judgment of the Judicial Committee Sir Joseph Napier observed: "A bailment on trust implies that there is reserved to the bailor the right to claim a re-delivery of the property deposited in bailment. No doubt the cases that are referred to are generally cases of a bailment without a question of mixture." He refers to 2 *Kent's Comm.*, sec. 589, as shewing that the true and settled doctrine rests on the test whether the identical subject matter was to be restored either as it stood or in an altered form, or whether a different thing was to be given for it as an equivalent, for, in the latter case, it is a sale, and not a bailment.

He also remarks, "An indelible incident of trust property is, that a trustee can never make use of it for his own benefit."

See *Young v. Lambert* (L. R., 3 P. C. App. 142.)

SPRAGGE, C., and STRONG, V. C., dissented, being of opinion that a nonsuit should have been entered.

Per Curiam—*Appeal dismissed, with costs.*

CAMPBELL AND WIFE V. THE GREAT WESTERN RAILWAY COMPANY.

Husband and wife—Count by both for injury to wife—Joinder, with separate count by husband—Entry of judgment—Error.

Held, that there was no error in the judgment entered under the circumstances stated in the *headnote* to this case, *ante* p. 345, and the judgment of the Court below was accordingly affirmed.

ERROR from the judgment in this case, *ante* p. 345, the grounds of error being the same as those taken in the rule *nisi* there, with the additional ground that, besides the damages, judgment had also been “entered for a larger sum than was awarded by the *postea*,” viz., the sum of \$60, for interest from the recovery of the verdict.

J. H. Cameron, Q. C., for the appellants, defendants below (a):—The first count is for injury to the wife; the second is intended to be for matters for which the husband alone could sue, but it in fact charges both. Then, again, the judgment is improperly entered for interest from the date of the verdict.

M. C. Cameron, Q. C., *contra*. As to the question of interest, it is admitted that it was improperly added, but the record can be amended.

What is contended by the appellants is, that the averment of the second count is a repetition of the first, but the second count is plainly for injury to the husband,

(a) Argued 28th June, 1870, before Draper, C. J. of Appeal, Richards, C. J., Spragge, C., Morrison, J., Mowat, V.C., Gwynne, J., Galt, J., Strong, V. C.

consequential upon the damage therein merely recited to have been sustained by the wife.

September 3rd, 1870.—GWYNNE, J., delivered the judgment of the Court.

We are of opinion that the judgment entered is free from objection except as to the interest calculated upon the amount of the verdict from the day of the rendering thereof.

The argument addressed to us by the learned counsel for the appellant appears to be more ingenious than sound, and it applies equally to the case of damages having been assessed separately by the jury, so that, if the damages had been so assessed, it would be equally error to enter *one* judgment for the amount. The whole force of the argument consists in the enquiry, "How can anything so anomalous be permitted as that a judgment in favour of husband and wife should be entered on the second count, in which, according to the contention of the husband plaintiff, he alone is interested?"

The answer appears to be, that the anomaly is permitted by the Statute, which expressly authorizes the two *causes* of action to be set out in the *one action* on the same record. Formerly it was thought to be, and perhaps is, *equally* anomalous, that in an action brought by husband and wife for an injury done to the wife, the judgment should be entered, "and so it is considered that *they* shall recover," &c., &c., when in truth the damages belong to the husband alone, and are recovered in fact by him alone.

In *Litfield and wife against Melherse* (Godbolt, 369), cited in 1 *Bac. Abr.*, title "Baron and Feme," p. 732, a writ of error was brought upon a judgment given in an action on the case brought by husband and wife in the Common Pleas, for words spoken of the plaintiff's wife, and the judgment in the Common Pleas was, *that the husband and wife* should recover, and *that* was assigned for error *because the husband only is to have the damages*, and the judgment ought to be that the husband alone should recover; but

notwithstanding this error assigned, the judgment was affirmed by the whole Court.

Here, then, in every case of judgment recovered in an action brought by husband and wife for a tort to the wife, is the anomaly which the defendants now complain of as error, namely, judgment in favour of husband and wife for *damages* which, when recovered, belong to the husband *alone*.

The Common Law Commissioners give as their reason for recommending that to a cause of action by husband and wife for an injury done to the wife, the husband should be permitted to *add* claims in his own right, as follows: "We do not propose, except in the case of husband and wife, that causes of action accruing to the plaintiff in different rights should be joined. The funds to which the sums recovered in such cases would be applicable, and the judgment with respect to each, would be different, *from which inconvenience might arise*; but, with respect to the joinder of a cause of action arising to a husband in his own right with one accruing to him in respect of his wife, *as the judgment*, in the event of his recovering a verdict, and the fund to which the judgment would be applicable, *would be the same*, we see no objection to permit the joinder, *in order to prevent the necessity of bringing two actions*. We have provided for the only difficulty which occurs to us as likely to arise in the case of the death of either party, by proposing that *the suit* should continue as to *such part of the cause of action* as would survive, and abate as to the rest;" that is, if the wife should die, that the action should abate as to the joint cause of action, and continue as to the husband's separate cause of action; and if the husband should die, that it should continue for the wife's benefit as to the joint cause of action, and abate as to the residue.

Now, what the defendants contend is, that the judgment should be entered as if there were *two separate actions* brought on the same record, at the suit of *two different sets of plaintiffs*, instead of two separate causes of action

in one action. If there be two separate actions, then, as the defendants' contend, there must be two judgments entered, not only for separate amounts of damages, but also for separate amounts of costs upon one writ of summons. There must also be separate writs of execution, for the writs of execution must follow the judgments; and if the defendant be a natural person, there may be satisfaction obtained upon one writ by *capias ad satisfaciendum* while the other writ is being executed against goods and lands; in fact, there shall be established that *very inconvenience of separate judgments* on the same record, which it was the intention of the Commissioners to avoid, and which they conceived they did avoid by confining the permission to the case of husband and wife.

Now, there is nothing in the Statute to warrant the conclusion that, in the case put, there are *two* actions instituted by *the one* writ, or that *two* judgments are contemplated to be entered; on the contrary, it is quite apparent that but one action and one judgment is what is contemplated. The 75th section of the C. L. P. Act says: "In *any action* brought by a man and his wife, *on any cause of action* accruing personally to the wife, in respect of which they are necessarily co-plaintiffs." So that it is only in *an action* brought by the two that "*the*" husband may *add thereto*," that is, to that *action*, "*claims in his own right*; and *separate* actions brought in respect of such claims may be consolidated if the Court or Judge thinks fit." Consolidated into what? Why, *into one action*; "but, in the case of the death of either plaintiff, *such suit* shall abate so far only as relates to the *causes of action*, if *any*, which do not survive."

Now, what can be plainer from this language than that what was sanctioned was that two *separate causes* of action, the damages in respect of which, when reduced to judgment, shall belong to the husband alone, may be united in *one action*; in which, there being no provision made for the entry of separate judgments, and *inconvenience* being all that could result from the entry of separate judgments.

but one judgment for the whole damages and costs need be entered ; and that judgment must, of necessity, be entered in the form that the *husband and wife* shall recover, although the damages and costs belong to the husband alone, *because the action in which alone the joinder of the separate causes of action is permitted is one brought at the suit of husband and wife*, who are the only persons named as plaintiffs in the writ of summons, which is the commencement of the action ? As therefore, the Statute allows the *two claims* to be inserted in the *one* action, the proper way appears to be to enter the judgment in favor of the plaintiffs in the action—namely, the husband and wife, upon the authority of the case in *Godbolt*, notwithstanding that all the damages recovered by the judgment belong to the husband, and would now go to his personal representative.

But what right can the defendants have to assign as error the matter suggested ? How are they, or could they, be prejudiced ? It is suggested that *possibly* the judgment, as entered, would be no estoppel to another action brought by the husband for the same cause of action as that stated in the second count. We confess we cannot see anything to justify a doubt upon this point, for beyond doubt it must be taken that some part, however small, of the damages given by the jury was so given in respect of the second count, and the judgment, being entered upon both counts, would be a complete bar for any damages which could have been claimed in respect of all the causes of action set out upon the record. It was however only suggested, and not argued, as indeed it could not well have been, that the judgment is not a bar in respect of both causes of action set out in it.

The objection as to interest might have been taken on an application to the Court below. It is not very clearly, although we think it is sufficiently, pointed out as a ground of error by the words, “and also because the judgment is entered for a larger sum than is awarded by the *postea*.” If the objection had been made in the

Court below, the error might have been rectified without the incurring of the costs of proceedings in error. Upon the argument here, the plaintiffs' counsel submitted that the judgment for interest could not be supported, and the argument proceeded upon the main point, upon which, in our judgment, the appellants fail, and should not therefore have costs. Under the circumstances, we think the judgment should be, that the judgment in the Court below be amended by striking out the sum of \$60 interest, and that the judgment be in other respects affirmed, with costs.

Judgment affirmed, with costs.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF COMMON PLEAS,

FROM MICHAELMAS TERM, 32 VICTORIA, TO EASTER TERM, 33 VICTORIA.

ABATEMENT.

Absence of plea in.]—See PLEADING.

ACCEPTANCE.

Of goods.]—See SALE OF GOODS.

ACTION.

By husband and wife.] — See HUSBAND AND WIFE.

By corporation officers for dismissal.]—See CORPORATION OFFICERS.

For non-delivery of goods.]—See JUS TERTII.

ADULTERY.

See DOWER, 1, 2.

AGREEMENT.

By Insurance Co., not under seal.]—See PLEADING.

AMENDMENT.

Striking out and adding defendants at trial.

At the trial, on objection by defendant's counsel, that one of the

defendants had been improperly joined in the action, the Judge, on plaintiff's application, struck his name out of the record; and upon defendant's counsel claiming the right to plead in abatement the non-joinder of another party, with the consent of the latter, his name was added to the record: *Held*, that the first amendment had been properly made, but not the second.—*McKee v. Joli et al.*, 516.

Adding count for malicious prosecution in action against Justice for false imprisonment.]—See FALSE IMPRISONMENT.

Duty of Quarter Sessions, in case of omission in conviction.] — See CONVICTION, 2.

Refusal of, in notice of title in Ejectment.]—See DEED OF BARGAIN AND SALE.

APPROPRIATION OF GOODS SOLD.

Sale of goods—Warehouse receipts—Evidence—Conversion—Trove—Detinue.

T. sold to plaintiff 2,000 bushels of wheat out of 3,000 bushels owned

by him, and lying in two bins in the warehouse of S., whose receipts he held for the same, and which he endorsed to plaintiff for the quantity sold to him, receiving from him payment for the purchase. The wheat remained in the warehouse for some time. T. and S. left the country, when defendants seized and converted the whole quantity to their own use, and plaintiff sued them in trover and detainue. The evidence of T., so far from shewing that he repudiated the sale, fully upheld it, and proved that he had told S. to appropriate all the wheat in one of the bins to plaintiffs, and S. stated that he would not, after the notice of the sale to plaintiffs, have delivered any of the wheat in the two bins to any one but plaintiffs, without retaining enough to satisfy plaintiffs' 2,000 bushels:

Held, sufficient evidence of an appropriation of the wheat by T. in fulfilment of his sale to plaintiff.

Quere, whether defendants, as wrongdoers, could set up the objection of the property not passing by reason of non-appropriation or non-severance.—*Coffey et al. v. The Quebec Bank*, 110, 555.

Trover will not lie where no specific appropriation.—See *TROVER*, 3.

ARREST OF JUDGMENT.

See *HUSBAND AND WIFE*.

ASSIGNEE.

Right to recover back moneys paid by insolvent after issue of attachment, though issue thereof unknown to payee.—See *INSOLVENCY*, 3.

Liability by non-resident assignee for invalid sale of goods by him.—See *WARRANTY*.

ASSIGNMENT.

Of policy of insurance to mortgagee.—See *EQUITABLE PLEADINGS*.

ATTORNEYS.

See *NEW TRIAL*.

BANK CHEQUE.

See *INSOLVENCY*, 1.

BARGAIN AND SALE.

See *DEED OF BARGAIN AND SALE*.

BAR OF DOWER.

Sufficiency of.—See *DOWER*, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Promissory note — Stamps not wholly cancelled.

The non-cancellation of some of the stamps to a promissory note, though the rest have been cancelled, invalidates the note, and the plaintiff cannot recover upon it.—*Lowe v. Hall*, 244.

2. *Bill of exchange addressed to Secretary of Co.—Acceptance in name of Co., as Secretary—Pleading.*

In an action against defendant, by endorsee, on the following bill of exchange:

\$800.

MONTREAL, Feb. 19, 1869.

Two months after date pay to the order of myself at the Jacques Cartier Bank, 500 Montreal, eight hundred dollars, value received, and charge the same to account of
E. E. GILBERT.

JAMES GILBERT,
Secretary, Richardson Gold Mining Co, Belleville, Ont.

Held, on demurrer, not to be the acceptance of defendant, and that he was not personally liable.—*Robertson v. Glass*, 250.

BILL STAMPS.

Partial cancellation insufficient.
—See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 1.

BLASPHEMY.

Insufficiency of conviction for.—
See **CONVICTION**, 1.

BOUNDARY LINES.

Evidence.

Held, that the entries in the diary of the surveyor, together with a small piece of map also produced, supposed to be his, (which was all that remained in the Crown Lands office shewing the lines in question run), and the trace of a blaze for a great part of the way, were evidence of the fact of the lines having been run by him in the manner in which he was directed to run them by his instructions (which were produced), although there was no further evidence upon the ground that the original lines had been run.—*Smith v. Chunas, et al.*, 213.

BY-LAW.

29–30 *Vic. ch. 51, secs. 186, 228*
—31 *Vic. ch. 13 (Ont.)—Construction.*

Held, that in every case in which it is necessary to submit a by-law to the electors for assent, the requirements of sec. 196 of 29–30 *Vic. ch. 51*, as regards notice, must be followed, and that sec. 228 only applies to those cases in which county councils are authorized to

raise money by by-law without submitting the same for the assent of the electors.

In this case the publication of the by-law was objected to as insufficient under sub-sec. 2 of sec. 196 of the act, the first publication being on the 8th, and the last on 29th October; but it was subsequently inserted on the 19th and 26th November, and also on the 3rd December, and every effort appeared to have been made to give the by-law publication: The Court, in the exercise of its discretion, refused to quash the by-law on this ground.

Held, also, that the by-law was not *ultra vires*, as the 2nd sec of the Act, under which it was passed, 31 *Vic. ch. 13* (Oct.), was wide enough to include county municipalities.—*In re Alexander Gibson v. The Corporation of the County of Bruce*, 398.

CERTIORARI.

Return to by convicting magistrate conclusive.—See **SALE OF LIQUOR WITHOUT LICENSE**, 1.

CHATTEL MORTGAGE.

1. *Proviso for absolute ownership on default*—*Lease by mortgagee to mortgagor*—*Execution against mortgagor.*

One S. on 25th March, 1868, executed a chattel mortgage to plaintiff, payable the following October, and containing a proviso that, on default, plaintiff, instead of selling the goods, might take possession as absolute owner. On default being made plaintiff accordingly went through a form of taking possession, without, however, any change in the possession actually taking

place, and executed a lease of the goods to the mortgagor. After default, and before this taking of possession by plaintiff, an execution against the goods was placed in the sheriff's hands, but no seizure was made until November, 1869, after the expiration of the mortgage, which had not been renewed :

Held, that the transaction between the parties was void, and that the execution took the goods.—*Chamberlain v. Green et al.*, 304.

2. *Absence of re-demise—Seizure before default—Right of action—Measure of damages.*

Held, following *Porter v. Flincoft*, 6 C. P. 340, and *Ruttan v. Beamish*, 10 C. P. 90, Gwynne, J., dissenting from the former, but concurring in the latter, that an action will not lie, at the suit of the mortgagor of chattels against the mortgagee, for seizure of the chattels before default in payment, where there is no proviso in the mortgage for possession by the mortgagor until default; but that even if an action did lie, the jury should be told that the plaintiff could recover only to the extent of his interest in the goods and for the damage done to such interest, instead of, as in this case, for their full value, as in the case of a wrong-doer.—*McAulay v. Allen*, 417.

CHEQUE.

Action by holder of.]—See *INSOLVENCY*, I.

COMMON COUNT FOR MONEY PAID.

Promissory note—Indorsement in fraud of maker after payment—Payment to indorsee under pressure of

judgment—Right to recover back from indorser under common count for money paid to his use.

Defendant held the joint and several note of plaintiff and one Bastedo, as security for the debt of the latter, after payment by whom, unknown to plaintiff at the time, he indorsed it to one White, who sued plaintiff, and under pressure of judgment obtained payment from him of the amount covered by it :

Held, that the money paid to White by plaintiff was money paid to the use of defendant, from whom plaintiff could, therefore, recover it back in this form of action.—*McKindsey v. Stewart*, 295.

COMPUTATION OF TIME.

See *NOTICE OF TRIAL*.

CONTRACT.

Conditional contract for purchase of goods.

Plaintiff telegraphed to defendant, in answer to an enquiry about price and quantity of butter on hand, that he had 100 kegs at 20 cents, and defendant replied he would take it, *if good*. Plaintiff did not state, in return, that it was good, or offer to guarantee that it was, but two days after he again telegraphed to come and ship the butter or send \$1500, to which defendant answered that he would try and see him the following week. After the lapse of several days plaintiff enquired whether defendant intended taking the butter or not. In an action by plaintiff against defendant, *Held*, that there was no binding contract between the parties, and a nonsuit was therefore directed.—*McIntosh v. Brill*, 426.

CONVERSION.

See APPROPRIATION OF GOODS SOLD.

CONVICTION.

1. *Conviction for using blasphemous language—No Statement of words used—Jurisdiction—Evidence.*

A conviction by a magistrate stated that defendant did on, &c., at, &c., being a public highway, use blasphemous language contrary to a certain by-law, which was passed almost in the words of C. S. U. C. ch. 54. sec. 282, sub-sec. 4, but there was no statement of the words used: *Held*. bad.

Semble, that there was nothing in the evidence set out below giving the magistrate jurisdiction to act.—*In re Bridget Donnelly*, 165.

2. *Conviction by Justice—C. S. U. C. ch. 105, and 25 Vic. ch. 22—29-30 Vic. ch. 50—Appeal to Quarter Sessions—Excess of jurisdiction.*

On appeal to the Quarter Sessions from a Justice's conviction, apparently intended to be under C. S. U. C. ch. 105, as amended by 25 Vic. ch. 22, of having at a time and place named, unlawfully entered the premises of defendant (describing them) with men and teams, and cut down and destroyed certain trees thereon, and taken therefrom a certain valuable walnut log, without stating the premises were *wholly enclosed*, it appeared in evidence that the premises in question were in fact wholly enclosed, but the Chairman directed the jury that the case, if any, was one arising under C. S. U. C. ch. 93, sec. 25, and he charged them accordingly. The jury found the appellant guilty, but the Chairman, notwithstanding, made an order

quashing the conviction, considering that the jury had erred in their verdict, as there was no *averment* or evidence that the damage done amounted to 20 cents, and he refused to amend the conviction under 29-30 Vic. ch. 50:

Held, that the conviction was one under C. S. U. C. ch. 105, as amended by 25 Vic. ch. 22, and that it was not competent for the Court of Quarter Sessions to convert the charge into one under C. S. U. C. ch. 93, sec. 25, but that the Chairman should have submitted the appeal to the jury in accordance with 29-30 Vic. ch. 50, notwithstanding the omission of the words *wholly enclosed*, and that having submitted it to them, though with an erroneous charge, their verdict of guilty should not have been rescinded, but have been treated as a determination of the appeal, and the Chairman should have amended the conviction, in accordance with 29-30 Vic. ch. 50, by the insertion of the omitted words, and have affirmed and enforced the same. A *mandamus* was therefore ordered to issue, directing the order of the Quarter Sessions to be set aside, as in excess of jurisdiction, and the conviction to be amended and affirmed.—*McKenna v. Powell*, 394.

Sufficiency of, in case of sale of liquor without licence.—See SALE OF LIQUOR WITHOUT LICENSE, 2.

Insufficiency of, under C. S. C. ch. 93, S. 28.—See MALICIOUS INJURY TO PROPERTY.

CORPORATION OFFICERS.

Corporation officers—Liability to dismissal—Right of action.—*Held*, that the new county council of a

municipality may, before recognition on their part, dismiss the officers appointed by the preceding council, and that such officers have no right of action against the municipality for their year's salary.—*Hickey v. Corporation of County of Renfrew*, 429.

COSTS.

In slander, under certificate for full costs, under 31 Vic. ch. 24 (Ont.), plaintiff can tax full costs of suit.]—See SLANDER.

Of setting aside irregularly obtained verdict, refused.]—See PROMISSORY NOTE. 1.

COUNTY.

Duty as to jury expenses.]—See JURY EXPENSES.

DAMAGES.

Assessment of separate damages on each of several counts.]—See FALSE IMPRISONMENT.

Excessive.]—Id.

Measure of.]—See CHATTEL MORTGAGE.

See JUS TERTII.

See HUSBAND AND WIFE.

DEED OF BARGAIN AND SALE.

Construction—C. S. U. C. ch. 90, sec. 2—Amendment.

In an indenture the granting words were, "grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the parties of the second part, their heirs and assigns, all and singular, &c. : To have and to hold unto the said parties of the

second part, their heirs and assigns forever, to the use and upon the trust following, that is to say, to and for the use of, &c., infant children of, &c., their heirs and assigns forever." It appeared in evidence that upon the execution of this deed by the grantor, which was executed in completion of a sale of his equity of redemption to the grantees, in settlement of an overdue mortgage held by them as representing the deceased mortgagee, the grantees discharged this mortgage and then mortgaged the estate back to the grantor to secure the purchase money of his equity : in ejectment, brought by the infant children against the lessee of the grantees, *Held*, that the use was not executed in them (the children), but that notwithstanding the use of the word "grant" in the deed, and C. S. U. C. ch. 90, sec. 2, the old rule, that deeds "shall operate according to the intention of the parties, if by law they may," must govern, and that intention, to be gathered from the mortgage transaction, which would otherwise be defeated, clearly was that the deed should operate as a bargain and sale, vesting the use in the bargainees, the subsequent use being a trust.

Held, also, that a proposed amendment in plaintiffs' notice of title, by adding a claim *by the grantees in the above indenture* for an alleged forfeiture of a lease executed by them to defendant, by reason of an alleged breach of covenant as to cutting timber, had been properly refused.—*Mitchell et al. v. Smellie*, 389.

DEFAMATION.

Insufficiency of averment in action for.]—See SLANDER OF TITLE.

DEPOSIT RECEIPT.

Deposit receipt for money—Delivery to another—Payment after notice—Equitable pleadings.

To an action on the common money counts and account stated defendants pleaded, by way of equitable defence, setting out a deposit receipt for moneys from them to plaintiff, to be accounted for by them to plaintiff, and, in substance, that plaintiff had, for good and valuable consideration, transferred all his right, title, and interest in equity to receive and demand payment of the fund, which defendants had paid over to the transferee.

Replication, on equitable grounds, in effect, that defendants did not *bona fide* pay amount of claim to a person or persons to whom plaintiff had, for good consideration, transferred all his right, title, and interest in equity, to receive and demand payment of the fund, but that he parted with the security under circumstances which, at best, gave the transferees an equitable charge upon the fund, whose extent had to be determined by certain acts to be done by them, and that they having taken no steps to ascertain the extent of the charge, plaintiff, before the alleged further transfer by them to certain parties (set up by the plea) and before payment by defendants, notified them that he disputed the validity of the equitable charge, and not to recognize it or pay any of the fund in respect of it, which defendants agreed not to do, but afterwards paid the same :

Held, a good replication.

Deposit receipts for money, given by a bank, are not negotiable instruments in equity any more than at

law, so as to entitle the holder to demand payment of the fund secured by them.—*Mander v. Royal Canadian Bank*, 125.

DETINUE.

See APPROPRIATION OF GOODS SOLD.

DISTRESS.

Exemption from, of horse of quartermaster of volunteer cavalry troop.]
—*See* VOLUNTEER OFFICER.

DIVISION COURT.

Division Court—Unsettled account—Splitting cause of action—Prohibition.

Plaintiff, having been employed by defendants to purchase wool for them, on a commission to be paid him for so doing, sued them in the Division Court for this commission and for a sum of \$10 paid to an assistant. It appeared that defendants had furnished plaintiff with \$1100, and that plaintiff had expended \$36 beyond this sum in the purchase of the wool, but no question was made at the trial as to the due expenditure of the \$1100, the only question being whether plaintiff was entitled to any commission at all, and no claim was made for the \$36, or any portion of it, the plaintiff's demand being confined to the commission claimed on the quantity of wool purchased and not on the price paid :

Held, not the case of an action for the balance of an unsettled account exceeding \$200, the balance of the unsettled account between the parties being \$36, which was not in question in this suit ; and a prohibition was therefore refused.

Held, also, that there was no splitting of one cause of action into two, this being the case of a plaintiff having two separate causes of action, one for work and labour, and the other for the recovery of a balance due for money paid by him for goods in excess of the amount furnished to him for that purpose.—*McRae v. Robins et al.* 135.

DOWER.

1. *Adultery.*

It is the voluntary living apart in adultery that deprives a wife of dower, whether the leaving the husband's roof was *sua sponte*, or in consequence of his violence, or whether he abandoned her without provision.—*Woolsey v. Finch* 132.

2. *Adultery.*

Held, adhering to *Woolsey v. Finch*, *ante* p. 132, that it is the voluntary living apart from the husband in adultery that creates the bar of dower, irrespective of the question as to how or why the separation came about.—*Neff v. Thompson*, 211.

3. *Wife not named in commencement of deed—Release in body of deed, and execution by her.*

Husband, by deed, aliens land, and the wife, though not named in the commencement, as a formal party, in the body of it releases her dower, and both execute it:

Held, a sufficient bar of dower by her within 2 Vic. ch. 6 (C. S. U. C. ch. 84.)—*Bonter v. Northcote*, 76.

EJECTMENT.

Religious Institutions Act (C. S. U. C. ch. 69)—*Ejectment by trustees*

—*Law Reform Act—Construction—Evidence.*

Held, that the trustees under C. S. U. C. ch. 69, may maintain ejectment in their individual names, with the subjoined description, “as trustees,” &c., &c., stating the name of the congregation or religious body for whom they are trustees, according to the description in the deed of conveyance.

At the trial evidence was tendered to shew that the congregation named in the deed, which was proved to have been made to the trustees on their appointment in 1864, had ceased to exist before the execution of the deed: *Held*, that this was properly rejected; as also evidence to shew that defendant held under the obligees of a bond, in discharge of which the deed was executed.

Held, also, that the action of ejectment is within the 18th section of the Law Reform Act (Ont.), and *Seem*, that such action *must* be tried without the intervention of a jury, subject only to the Judge's discretion to direct one.—*Humphreys et al. v. Hunter*, 456.

EQUITABLE PLEADINGS.

Insurance—Assignment of policy to mortgagee—Arson by assured—Equitable replication disclosing no new facts—Pleading.

Declaration, on a fire policy to plaintiff on premises subsequently mortgaged for \$2000 to one S., alleging an assignment of the policy by plaintiff, with defendants' assent, to S.; that S. continued interested to \$2000 down to loss, and plaintiff, during all the time last aforesaid, and at the time of the loss, was interested therein to said

amount so insured, as also as trustee for S. Then, after setting out the loss, it proceeded, whereby said S. and plaintiff, as trustee for him, *and in his own right*, suffered damage, &c.

Plea, Arson by plaintiff.

Replication, on equitable grounds, that before loss the policy was, with defendants' assent, duly assigned to S., and the action was brought by plaintiff, as trustee, and for benefit of S.

Held, on demurrer, replication bad.—*Chishom v. The Provincial Insurance Company*, 11.

See DEPOSIT RECEIPT.

EQUITY OF REDEMPTION.

Sale of portion—*Garnishment execution at suit of creditor of mortgagee*.

Held, following, *Heward v. Wolfenden*, 14 Grant, 188, that it is the whole estate termed the equity of redemption in the mortgaged premises, when that estate is the property of the person against whom or against whose executors or administrators the judgment, upon which the execution issued, was obtained, and not an interest in or parcel of the estate, of which the statute 27 Vic. ch. 13, authorizes the sale.

Semble, that an equity of redemption in mortgaged premises cannot be sold upon a *garnishment* execution sued out against a mortgagor, in respect of the mortgage debt, at the suit of a creditor of the mortgagee.

Quære, per Gwynne, J., whether an equity of redemption can be sold upon an execution, issued upon a judgment recovered at the suit of the mortgagee, in an action upon the covenant contained in the mort-

gage for payment of the mortgage debt.—*Vannorman v. McCarty*, 42.

ERROR.

Interlocutory judgment—*Error*.

Error will only lie upon a final judgment. Therefore, where the entry on the roll was, that the plea was held bad and the declaration good, and that plaintiff ought to recover his damages, &c., but because it was unknown, &c., judgment was stayed till damages ascertained, &c.; *Held*, that error would not lie on this record.—*Grand Trunk Railway Company v. Amey*, 6.

EVIDENCE.

Improper admission of, does not entitle to new trial, where evidence otherwise sufficient to support verdict.—*See* FALSE IMPRISONMENT.

Of appropriation of goods sold.—*See* APPROPRIATION OF GOODS SOLD.

Disclosing nothing to give jurisdiction to magistrate.—*See* CONVICTION, 1.

Of running of boundary lines.—*See* BOUNDARY LINES

Proper rejection of.—*See* EJECTMENT.

See INADMISSIBLE EVIDENCE.

EXCESS.

Of jurisdiction by Quarter Sessions in case of Magistrate's Conviction.—*See* CONVICTION, 2.

EXECUTION.

Priority over Chattel Mortgage.—*See* CHATTEL MORTGAGE, 1.

EXECUTORS

Of debtor, cannot be put into insolvency.—See **INSOLVENCY, 2.**

EXTRADITION.

Extradition—Forgery—Case presenting several views.—In cases arising under the Extradition Treaty, if the evidence present several views, on any one of which there may be a conviction, if adopted by the jury, the court will not discharge the prisoner, but will direct extradition.

Held, also, that the execution of a deed by prisoner in the name of and representing himself to be another, may be forgery, if done with intent to defraud, even though he had a power of attorney from such person, but fraudulently concealing the fact of his being only such attorney, and assuming to be the principal.—*In the matter of the Queen v. Albert J. Gould, 154.*

FALSE IMPRISONMENT.

False imprisonment—Justice of the peace — Warrant — Jurisdiction — Separate damages — Admission of improper evidence—Excessive damages—Adding count.

Defendant, a justice of the peace, on the 5th May, 1869, issued his warrant against plaintiff on an alleged charge of stealing a lease, without any information being laid, upon which warrant plaintiff was arrested and brought before him :

Held, that defendant was liable in trespass, as without information on oath he had no jurisdiction over the person of plaintiff.

Defendant, on 11th May, caused plaintiff to be brought before him a

second time on said warrant when there was no prosecutor, no examination of witnesses and no confession, and committed plaintiff for trial :

Held, following *Connors v. Darling, 23 U. C. 541*, that it was a new act of trespass for which a second count was well laid in the declaration.

At the Sessions defendant appeared as prosecutor, when plaintiff was tried and acquitted :

Held, that a count for malicious prosecution could be added for this.

Held, also, 1. That a warrant, though good on its face, will not protect a justice under cap. 126, C. S. U. C. sec. 2, unless issued upon a proper information.

2. That the jury may assess several damages on each count.

3. That the court will not grant a new trial for the improper admission of evidence where there clearly appears to be sufficient evidence to support the verdict independently of the evidence so admitted.

4. That \$1000 damages were not so excessive as to warrant a new trial. (See *Berry v. D'Acosta, L. R. 1. C. P. 331.*)—*Appleton v. Lepper, 138.*

FIXTURES.

Interpleader—Mortgagor and Mortgagee—Fixtures.

A. owns term, with right of purchase, builds water-mill on premises, and mortgages to B. for present and future advances ; afterwards introduces steam power, consisting of engine and boiler, into the mill, affixed as under ; subsequently an extension of the

term to B., the mortgagee, with right of purchase, is obtained from reversioners by deed, to which A. and B. are partners, reciting their position :

Held, that the steam power belonged to B., as mortgagee, and could not be seized under execution against A., though they might be trade fixtures, and though the estate mortgaged was not a freehold interest.—*Paterson v. Pyper*, 278.

FORGERY.

See EXTRADITION.

FRAUDULENT PRE- FERENCE.

See INSOLVENCY, 1.

GARNISHMENT EXECU- TION.

Equity of redemption in mortgaged premises cannot be sold under.—*See* EQUITY OF REDEMPTION.

GLEBE LANDS.

Lease by Rector—Covenant for renewal—Continuance in possession after lessor's death—Insurable interest.

A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant.—*Shaw v. Phoenix Insurance Company*, 170.

GUARANTEE.

Offer to become security—Guarantee—Construction.

A guarantee should be construed as all other contracts, not strictly as against either side, but by collecting the real intention of the parties from the instrument and the surrounding circumstances, taking the words in their ordinary sense, unless by the known usage of trade they have acquired a peculiar meaning.

In this case it appeared that one H., requiring some proof spirits for the purposes of a trade carried on by him, received from defendant a friend of his, a letter of introduction to plaintiff, a distiller, to whom defendant was well known, but H., an entire stranger, though as well as defendant, living in his neighbourhood. There had not been, as far as appeared, any previous application by H. to plaintiff for a credit, nor had the latter declined dealing with him without a guarantee. The letter to plaintiff was as follows: "The bearer is Mr. Joseph Hugill, a friend of mine, who wishes to purchase some proof spirits, which he hears that you manufacture. If you can arrange matters to your mutual satisfaction, I am sure that Mr. Hugill will prove a very reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for":

Held, upon the authority of *McIver v. Richardson*, 1 M. & S. 557, that this letter did not import a perfect and conclusive guarantee in itself, but that to make it such it was necessary that plaintiff should have notified defendant that he accepted the proffered guarantee

and that he had given or meant to give credit to H. on the strength of it.—*Kastner v. Winstanley*, 101.

HUSBAND AND WIFE.

Action by husband and wife—Separate count by husband—Damages assessed generally—Arrest of judgment.

After a count by husband and wife for injury done to the wife during coverture, a second count, by the husband alone, after setting out the fact of the horse and cutter, in which both plaintiffs at the time were, having been precipitated over a bridge with the wife, and that she was thereby greatly injured, and laid up for a long time in consequence of the injuries sustained by her, and endured great suffering, proceeded to allege that the husband was put to great trouble and expense by reason of the loss of his wife's society and her services, and was compelled to pay and did pay large sums of money, on account of her illness, to nurses and medical men, &c., and also lost the said horse and cutter, and was otherwise put to great expense, &c. The jury having found for plaintiffs, and assessed damages generally on both counts,

Held, that after verdict the second count must be treated as a count only for the damage of the husband, for which he alone could sue; and that, treating it as such, it was well joined with the first count, under the Common Law Procedure Act, though damages were sought by it for the injury to the horse and cutter, as well as for that resulting to the husband from the injury to the wife.

Held, also, that defendants were

not entitled to arrest the judgment on the ground that the damages had not been separately assessed upon each count.—*Campbell and wife v. Great Western R. W. Co.*, 345, 563.

INADMISSIBLE EVIDENCE.

Replevin—Avowry setting out several independent matters—Plea of non tenuit—Evidence.

In replevin, to an avowry setting out a mortgage and demise to the mortgagor, the entry thereunder, non-entry of mortgagee and non-exercise of power of sale, the permitting mortgagor to continue as tenant, and that while so occupying there was a large arrear of interest, &c., &c., plaintiffs simply pleaded *non tenuit*, and under it sought to give in evidence the fact of payment of the mortgage before distress, with a view to shewing that there was, consequently, not tenancy: *Held*, inadmissible.—*Royal Canadian Bank v. Kelly*, 519.

INSOLVENCY.

1. *Bank cheque—Plea of not the holder—Jus tertii.*

A., a private banker, exchanged cheques with B., for mutual accommodation. A. used B.'s cheques. A cheque of A.'s had been dishonoured, and the holder called at A.'s office same day, and a clerk in ordinary course of business gave the holder B.'s cheque to pay the dishonoured cheque. Next day A. stopped payment: *Held*, that the holder could recover against B. on his cheque.

Held, also, that under plea of not the holder, B. could not set up any

supposed right in A.'s assignee, nor possibly under any pleading on these facts.

Held, also, following *McWhirter v. Thorne*, 19 C. P., 302, that the transfer was not a fraudulent preference within the Insolvent Act.—*City Bank v. Smith*, 93.

2. *Practice—Executors of debtor*—29 Vic., ch. 18, sec. 2.

On an application to him for the allowance of an appeal from the decision of the judge in insolvency, the judge in chambers made an order referring the matter to this court without directing a special case to be settled between the parties, but no objection was made on this ground:

Held, that this was only an irregularity which might be waived, and if not waived ought to have been objected to by a rule to set aside the proceedings on that ground, in accordance with *In re Parr*, 17 C. P. 626; and that, as the petition of appeal had been filed by permission of the court, and the appellant authorized to serve notice of hearing of appeal for a day named, the case was properly before the court for adjudication.

Sec. 27 of the Insolvent Act of 1865 (29 Vic. ch. 18) does not enable the creditors of a deceased person to put his executors or administrators into insolvency in their representative character.—*In re Sharpe, an Insolvent*, 82.

3. *Payment after attachment issued*—*Right of assignee to recover*.

Held, following *Roe v. Royal Canadian Bank*, 19 C. P. 347, that the assignee in insolvency was entitled to recover from defendants moneys paid by the insolvent to the defendants after a writ of attach-

ment, though unknown to defendants, had issued against the insolvent.—*Roe v. Bank of British North America*, 351.

INSURANCE.

Fire policy—Double insurance—Absence of notice and assent.

Besides the provision of C. S. U. C. ch. 52, sec. 28, one of the conditions indorsed on a policy, issued to plaintiff by defendants, a Mutual Insurance Co., was that, in case of insurance effected with other companies, notice must be given to defendants and their approval indorsed on the policy, and the passing of a resolution avoiding the policy, and mailing a copy addressed to the assured, should avoid the same. After the issue of the policy in question to plaintiff, he applied to another company for a further insurance, and received from the local agent an interim receipt, by which, it appeared in evidence, the company considered themselves bound until they should repudiate the risk, which in this case they did not until after the occurrence, though in ignorance, of the fire, their liability for plaintiff's claim, made for loss sustained by which, it appeared they had not yet decided as to. No notice was given to defendants of this further assurance until they received from plaintiff his statement and affidavit after the fire, when he swore to the existence of it, upon the second day after the receipt of which defendants mailed to him a copy of their resolution avoiding his policy:

Held, that plaintiff having effected an insurance with another company, which, from all that appeared from the evidence, was

binding upon that company, and having failed to notify defendants thereof, defendants were not liable under their policy, which they had the right to avoid even after the occurrence of the fire.—*Bruce v. Gore District Mutual Assurance Co.*, 207.

2. *Insurance—Chattel Property—Condition as to incumbrance on realty—Construction.*

To an action on a policy of insurance of chattel property, defendants pleaded that plaintiff, in his application, falsely, &c., stated that he held the property, in which the goods insured were, by deed and unincumbered, whereas said property was largely mortgaged, and that this should have been communicated to defendants, by reason of which, &c., &c. The evidence given, in support of this plea, was that to a question contained in a printed form of application, wholly inapplicable in many of the questions to insurance on chattel property alone, whether the property was incumbered, defendants' agent, at plaintiff's dictation, filled in the answer that there was no incumbrance, it further appearing that on this latter question being put, plaintiff was about to explain that the *land* was mortgaged, when the agent stopped him, stating that that was of no importance, as the proposition was merely for insurance of goods, and that question related only to realty, whereupon, the goods not being incumbered, the agent wrote the answer accordingly:

Held, that the question must be considered as relating to the goods insured, and not to the real property, and that the plea was therefore not proved.—*Ashford v. Victoria Mutual Assurance Co.*, 434.

3. *Insurance—Covenant against misrepresentations—Avoidance of policy.*

By a policy of insurance, the assured covenanted that his application contained a just and true exposition of all the facts respecting the condition, &c., of the property insured, and that if any material fact should not have been fairly represented the policy should be void; and it was also provided that the insurance might be continued for any agreed length of time on payment of premium, and renewal receipt being given, the continuance to be considered as under the original representation, except where varied by new representation in writing, &c. On the application for insurance the assured was asked whether there was any incumbrance on the property, to which he answered in the negative. Subsequently, in consequence of an agreed reduction in the premium, a new policy was issued on the same property and for the same amount, no new application being made or questions asked or answered. It turned out that there was in fact an incumbrance on the property:

Held, that in the absence of direct evidence to the contrary, this latter policy must be assumed to have been based on the then existing written statement by the assured as to the general state and title of the property, and that the insurers unless explicitly notified to the contrary, had a right so to consider it; and therefore, *Held*, that the assured could not recover.—*Martin v. Home Insurance Co.*, 447.

Insurance—Condition as to additional insurance—Want of notice—

identity of property insured—Misdirection.

One of the conditions of a fire policy, in this case, was that the insured should at once give notice in writing to the head office of any additional insurance, and should have the consent of the directors there-to, if given, endorsed on policy, otherwise policy to be void; and this condition was declared to be not withstanding anything contained in another condition as to giving notice with reasonable diligence:

Held, that under this condition the assured ran the risk, in effecting a second insurance, of getting defendants' assent, which he had done, and that the question of reasonable time or diligence in giving notice and getting such assent, which was urged as a defence, could not arise.

Held, also, that the happening of the fire did not absolve the assured from performance of the condition.

The proposal for subsequent insurance spoke of the existing insurance with defendants, and plaintiff in his proofs of loss swore to the fact, and no evidence was offered in any way meeting this, while the plaintiff, in the second count of his declaration, admitted the property insured to be the same: notwithstanding, the question of identity of property covered by the different policies was submitted to the jury:

Held, that this was wrong, as the question, on the evidence, was not open.—*Weinaugh, Administrator of Burgy, v. Provincial Insurance Co.*, 405

By lessee of Glebe land.—See GLEBE LANDS.

Loss payable under policy to third party.—See MARINE INSURANCE.

See WAREHOUSE RECEIPT.

“EQUITABLE PLEADING.

INSURANCE COMPANY.

Parol agreement by agent to refer to arbitration—Pleading.

Held, on demurrer to a plea setting up the absence of the corporate seal, that a *parol* agreement, entered into by “the duly authorized agents” of an incorporated Insurance Co., to refer to arbitration the question of the legal liability of said Co. to bear any portion of the expenses of raising and repairing a vessel, insured by them and subsequently lost, was not binding upon the Co., as not being a contract relating to the purposes for which the Co. was incorporated.—*Calvin v. The Provincial Insurance Co.*, 267.

INTERLOCUTORY JUDGMENT.

Error will not lie on.—See ERROR.

INTERPLEADER.

Goods belonging to plaintiff and stored in defendants' warehouse were alleged to have been sold by plaintiff to M., who, with plaintiff, came there and marked them in a certain way, after which, under plaintiff's instructions, they were despatched by defendants to T., as plaintiff's property, and delivered to his order. On the goods being claimed by M. as his property, defendants applied for an interpleader as between plaintiff and M., but *Held*, that in such a case interpleader would not be awarded.—*Brill v. Grand Trunk Railway Company*, 9.

See FIXTURES.

JOINT CONTRACT.

See PLEADING.

JUDGMENT DEBTOR.

*Examination where not resident—
Order embracing both garnishment
provisions of C. L. P. A. and those
of sec. 41 Con. Stat. U. C. ch. 24
—Pleading.*

Held, on demurrer to the replication set out below, that under sec. 41 Con. Stat. U. C. ch. 24, the judge of the county court can direct the examination of a judgment debtor to take place outside of the county where such debtor resides; but that the committal must be to the jail of the county where the defendant resides.

The plea justified the arrest and imprisonment of plaintiff under an order made by the county judge, embracing the enactments of the garnishment clauses for the attachment of debts and production of books and documents, and those of sec. 41 Con. Stat. U. C. ch. 24, and also under an order of commitment by such judge, which recited that it appeared from the examination that plaintiff had made away with his property in order to defeat or defraud creditors, especially plaintiff, and had not made satisfactory answers respecting same, and had not produced his books, as required by the order under which he was examined, with an averment that plaintiff did not on examination make satisfactory answers as to his property, &c., and it appeared to the judge that plaintiff had made away with his property (specifying certain effects), in order to defeat, &c. :

Held, on demurrer, that inasmuch as, if the proceeding had been

under above section 41 alone, plaintiff could under that section have been properly required to produce his books, and therefore an order adjudicating that he had not made satisfactory answers touching his estate and had not produced his books, after being required so to do, would have been sufficient, the court would not be warranted in holding the order set out in the plea void, because it might be presumed, on a close verbal criticism of the words used, that the nonproduction of the books was only a default under the garnishment branch of the order (for which there could be no commitment,) but would, on the principle of *Bullen v. Moodie*, 13 C. P. 137, intend that the judge acted on that part of the proceeding which was within his jurisdiction, unless it appeared clearly the other way.—*Switzer v. Brown*, 193.

JURY EXPENSES.

Arrears due by city for several years—County no right to recover.

It is the duty of the county, under the act relating to jurors, each year to ascertain and demand from the city its proportion of the jury expenses for that year, and unless this is done the accumulated arrears of several years, during which there has been an omission by the county to ascertain and demand any sum, cannot be recovered.

18 Vic. cap. 130 was not repealed by 22 Vic. cap. 100, but the provisions of the former Act were thereby imported into one Consolidated Act relating to juries.

Quære, as to the proper party to sue in the case of assets belonging

to a union of counties and to recover which no suit is brought till after the dissolution of the union.—*Corporation of Frontenac v. Corporation of Kingston*, 49.

JUS TERTII.

Action for non-delivery of goods—Jus tertii—Damages—Tender.

Plaintiff had sold certain goods to M., which were at the time lying at defendants' railway station, and defendants were fully aware of the sale, but notwithstanding they contracted with plaintiff to carry and deliver them for him as required, and gave him a shipping bill accordingly. In an action by plaintiff against defendants for the non-delivery. *Held*, that defendants could not set up M.'s title to the goods as against the plaintiff.

It further appeared that beyond the fact of M. having notified defendants of his claim, and making a demand for the goods, he did nothing to indicate his intention of looking to them for damages, but in fact sued plaintiff and recovered the whole amount of his claim from him: *Held*, that the case could not be brought within the principle of a bailee setting up the *jus tertii* against the bailor, as there was here no *bonâ fide* defending in right and title of such third person. *Held*, also, that plaintiff was entitled to recover the whole value of the property converted, and not merely the difference between the price at the time of refusal to deliver and tender of it back again.

The tender in question was made in writing by defendants' solicitor, two days before the Commission Day of the Assizes, offering for plaintiff's acceptance the 50 kegs

of butter, (the goods in question), sold by him to M., and for which M. had recovered against him, stating same to be at T. at plaintiff's own risk: *Held*, wholly illusory, and not to partake of any of the incidents of a legal tender.—*Brill v. The Grand Trunk Railway Company*, 440.

See INSOLVENCY, 1.

JUSTICE OF PEACE.

Liability of, in trespass, for issuing warrant without information on oath.]—See FALSE IMPRISONMENT.

Conviction by.]—See CONVICTION, 2.

LAW REFORM ACT.

Ejectment within 18th section of.]—See EJECTMENT.

LIMITATIONS (STATUTE OF)

Admission by maker to payee enures to subsequent holder.]—See PROMISSORY NOTE, 2.

MALICIOUS INJURY TO PROPERTY.

Conviction by magistrate—C. S. C. ch. 93, sec. 28—Insufficiency.

Held, that a conviction, purporting to be under Consol. Stat. C. ch. 93, sec. 28, charging that defendant, at a time and place named, wilfully and maliciously took and carried away the window sashes out of a building owned by one C., against the form of the statute, &c., without alleging damage to any property, real or person, and without finding damage to any amount, was bad, and the conviction was therefore quashed.—*Regina v. Caswell*, 275.

MARINE INSURANCE

1. *Unseaworthiness—New Trial.*

In a marine insurance policy issued by defendants to plaintiff, among other excepted perils or losses, were those arising from rottenness, inherent defects, and other unseaworthiness. At the trial it appeared from plaintiff's own evidence that the vessel in question, after sailing all day on a summer sea, with a light breeze, in the evening suddenly came up into the wind, or broached to, refused to answer her helm, and at once began settling down, when the crew abandoned her, and after they had rowed about thirty-five yards she sank. The master could give no reason for this, nor was any evidence offered in explanation of it, while the evidence for the defence went to shew that she was old and rotten in parts; that she in fact leaked, before starting across the lake, in the canal and at the port of lading, and that men would not go in her without being paid extra wages, and the plaintiff himself stated that she was old and he had given instructions not to canal her by night or leave port in a gale. A diver, who examined her, also found one stave wholly out and another partially so. The whole case having been left to the jury on this evidence:

Held, that the learned judge should have ruled according to *Coons v. Aetna Ins. Co.*, 18 & 19 C. P. 305 and 235, and, if plaintiff declined a nonsuit, should have explicitly told the jury to find for defendants; and a new trial was, therefore, ordered.—*Myles v. Montreal Insurance Co.*, 283.

2. *Loss payable to another, and action by him—Nonsuit.*

A marine policy was in this form: The *Aetna Insurance Co.*, of, &c., on account of Alfred Coons, loss, if any, payable to Lachlan McCollum (the plaintiff) in gold, do make insurance, &c.

Held, that the contract on this policy was entered into with Coons, and that making the loss payable to McCollum did not make him the party insured; and therefore *Held*, that in an action upon it by McCollum he was properly nonsuited.

Semle, that the insertion in the policy of the words "for or in the name of all persons interested, &c.," or "for whom it may concern," would have enabled McCollum, on shewing interest, to recover; also, that the words, "as broker" or "as agent," following after Coons's name, would have let in parol evidence to shew the interest and right of an undisclosed principal, who could have sued on the policy.—*McCollum v. Aetna Insurance Co.*, 289.

MEASURE OF DAMAGES.

See CHATTEL MORTGAGE, 2.

MISDIRECTION.

See INSURANCE, 4.

" SEDUCTION, 2.

MISJOINDER.

Right to amend at trial by striking out defendant.—*See* AMENDMENT.

MORTGAGOR AND MORTGAGEE.

See FIXTURES.

MUNICIPAL COUNCIL.

May dismiss officers appointed by predecessors.]—See CORPORATION OFFICERS.

NEGLIGENCE.

See NEW TRIAL.

NEW TRIAL.

Negligence.

Plaintiff having sued and obtained a verdict against defendants, for alleged negligence, as his attorneys, in not having procured the attendance of a couple of witnesses, stated to be material, at a trial between plaintiff and another, in which plaintiff failed, but it not having appeared that the evidence of such witnesses would have produced a different result, the Court, on that ground, granted a new trial, and also because it appeared that defendants' leading counsel, at the trial in question, had decided upon proceeding without such evidence.—*Wade v. Ball et al.*, 302.

Court will not grant for improper admission of evidence where sufficient independent evidence to support verdict.]—See FALSE IMPRISONMENT.

See MARINE INSURANCE, 1,
" WARRANTY.

NEW TRIAL REFUSED,

To defendant, in seduction, where evidence shews rape.]—See SEDUCTION, 1.

NONJOINDER.

Cannot be amended by adding defendant at trial even by consent.]—See AMENDMENT.

NONSUIT.

See CONTRACT.

" MARINE INSURANCE, 2.

NOTICE OF TRIAL.

C. S. U. C. ch. 22, sec. 202—Computation of time—Practice.

In computing the eight days notice of trial, or assessment, under sec. 201, C. S. U. C. ch. 22, the commission day of the assizes is to be included.

Cuthbert v. Street, 6 U. C. L. J. 20, per McLean, J., in Chambers, overruled.—*Morell v. Wilmott*, 378.

Trifling irregularity in, will not entitle to set aside verdict.]—See SETTING ASIDE VERDICT.

OSGOODE HALL.

Repairs—Liability for.

In the year 1846, the Law Society of Upper Canada entered into a covenant with the Crown, in conformity with 9 Vic. ch. 33, to provide, at their own cost, and without further charge to the province, for all time to come, fit and proper accommodation for the Superior Courts of Law and Equity for Upper Canada, as then existing or thereafter to be constituted; and in default, or in case of the buildings becoming dilapidated, &c., the Crown to repair, &c., and the outlay to become a charge on the Society's land. On the execution of this covenant, the sum of £6,000 was paid over to the Society by the Government, and proper accommodation was provided by the former for the then existing Courts.

Subsequently the Court of Common Pleas was established, and it became necessary to enlarge the buildings in which the Courts were held at a greatly enhanced outlay. 18 Vic., ch. 122, 20 Vic., ch. 64, 22 Vic., ch. 31, and C. S. U. C. ch. 33, were passed for raising funds for the purpose; and the moneys authorized thereby were expended in the erection of Osgoode Hall, for the accommodation of the Courts. In 1865, at the request of the Society, a certain sum was supplied by the Government for necessary repairs to the building, and by subsequent arrangement with the Ontario Government, the latter agreed to pay the Society annually the sum of \$3,000 for the purposes of heat and light:

Held, per Hagarty, C. J., that notwithstanding the greatly increased expense, since the passage of the above Acts, of repairing and maintaining the buildings, the Society was nevertheless bound by its covenant to repair and maintain them, and was not impliedly, much less expressly, released therefrom in consequence of the legislation that had taken place in relation thereto.

Per Galt, J., that the effect of 33 Vic., ch. 9 (Ont.) was to entitle the Law Society to have the Government account to them annually for the sum of \$29,000, and that this sum must be considered as a provision to enable them to perform their covenant, and that consequently the same was in full force.

Per Gwynne, J., that the effect of subsequent legislation had been to discharge the Society from their covenant.—*Regina v. The Law Society*, 490.

PAROL AGREEMENT.

By incorporated Insurance Co.]—
See INSURANCE Co.

PARTITION.

*Issues in, are within Law Reform Act.]—*See SETTING ASIDE VERDICT.

PATENT OF INVENTION.

New application of old invention, but no discovery of new principle.

In an action for an infringement of patent, described as a "new and useful improvement in the construction of steam and water saw-mills," it appeared from the specifications that what the patentee claimed as his invention was "generally the simplicity of construction of the saw-mill and making it portable, but specially the direct application of steam or water power by the connecting rod or shaft B to drive the circular saw."

Plaintiff, the assignee of the original patentee, proved that apparently his plan was the first in which the direct application of the motive power was made to drive circular saws, by placing the saw at the end of the shaft to which the motive power was directly applied, thereby saving the use of the belt and pulleys, by which the second shaft, to which the saw had been attached, was turned, and discontinuing that shaft also. For the defence it was shewn that "direct action" plan had long before the date of the patent in question been applied to other steam engines, locomotives, and machinery, the only novelty appearing to be in

the discontinuance of the second shaft in driving a circular saw.

The jury were directed to enquire whether the invention was new, or whether it was a new application of an old invention to the propelling of a circular saw, and they found that the patent was for "a new application of an old invention to the propelling of a circular saw: "

Held, that upon this direction the verdict could not be supported, and that the proper question was whether the invention was novel and useful.

Held, also, following *Smith v. Mutchmore*, 11 C. P. 458, and *Smith v. Ball*, 21 U. C. 123, in which the same patent was in question, that the specifications must be taken to be sufficient.

Semble, that the invention or improvement, claimed by plaintiff in this case, was not the subject of a patent.

The saving of labour and expense and the production of a new and useful result, cannot alone support a patent: there must be some *invention*.

The art or contrivance, which is the subject of a patent, must be new, and it is not sufficient that the object or application of the contrivance itself is new, if the contrivance itself be old.—*Watrous v. Bishop*, 29.

PERSONAL LIABILITY.

See PROMISSORY NOTE, 3.

PLEADING.

Marine Insurance—Loss—Agreement to raise vessel not under seal—

Averment of agent being duly authorized—Joint and several contract by two companies—Action against one—Absence of plea in abatement.

Declaration on a marine policy, setting out the issue of same by defendants, and of a similar one by another company; that vessel lost; that by policy defendants allowed in certain cases to interpose, recover and repair vessel; that vessel sank while towed by plaintiff's tug; that defendants and other company, being desirous of recovering vessel, by their respective duly authorized agents in that behalf, entered into an agreement in writing with plaintiff, reciting loss, and that plaintiff should raise vessel for \$3000. and plaintiff, defendants, and the other company should submit to the arbitrament of arbitrators, one to be chosen by plaintiff, another by defendants and the other company, and the third by two so chosen, the question by whom said money and other expenses should be paid, &c.; that plaintiff raised vessel; had always been willing to appoint, and did appoint, an arbitrator, and was willing to submit such question, &c., of which two companies had notice, and although plaintiff requested them, &c., yet defendants always since *wrongfully REFUSED*, *either in concert with other company or otherwise, to appoint arbitrator, and always wrongfully refused and continued to refuse to appoint or concur in appointing on their behalf and that of the other company, and by reason of such wrongful refusal, &c., &c.*

Held, on demurrer, good, and that an objection that the agreement was not shewn to have been under seal was premature, for that

it might either arise as a matter of evidence at the trial, or be made the subject of a plea; and that in the face of the averment that the act done, by which it was sought to bind defendants, was *by an agent duly authorized*, it could not be assumed that the authority was not full and sufficient.

Held, also, that the contract disclosed was joint; that defendants could have pleaded in abatement; that each was liable for the other, whether the joint non-performance was caused by such other or not; and that, there being no plea in abatement, the declaration was good against the demurrer.—*Calvin v. Provincial Insurance Company*, 21.

Inadmissible evidence under plea of non tenuit.—See INADMISSIBLE EVIDENCE.

Under plea of not the holder the jus tertii cannot be set up.—See INSOLVENCY, 1.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

See JUDGMENT OF DEBTOR.

See RAILWAYS & RAILWAY CO'S.

See SLANDER OF TITLE.

See INSURANCE COMPANY.

See WARRANTY,

PRACTICE.

See INSOLVENCY, 2.

See SETTING ASIDE VERDICT.

See NOTICE OF TRIAL.

PROHIBITION.

See DIVISION COURT.

PROMISSORY NOTE.

Note payable in United States currency—Law Reform Act, 32 Vic. ch. 6, sec. 17, Ontario—Verdict irregularly obtained set aside without costs.

Held, that a note made in the United States and payable in American currency is not an amount liquidated or ascertained by the signature of the defendant, so as to entitle the party suing upon it to avail himself of the provisions of 32 Vic. ch. 9, sec. 17, Ont.

Section 17 of the above Act enabled a plaintiff at any time after the Act came into operation to take down to the County Court for trial the issues joined in any of the causes of action specified therein, whether the issues were joined before or after the Act came into force, provided only the provisions of sub-section 3 were duly observed.

In this case the verdict, though irregularly obtained, was set aside without costs, as defendant's attorney had not raised the objection upon which the verdict was set aside until after it had been obtained, and his conduct was wanting in candour in not drawing attention to such objections to the procedure as he intended to insist until the day before the trial, although he might have done so some two months before.—*Cushman et al. v. Reid*, 147.

2. *Statute of Limitations—Written acknowledgment—Subsequent holder.*

Held, that a memorandum in writing, signed by the maker of a promissory note, admitting the amount to be due to the payee, which, in the opinion of the Court, was sufficient, in an action by the payee, to prevent the operation of the Statute of Limitations, enured

to the benefit of a subsequent holder of the note.—*Marshall v. Smith*, 356.

3. *Note signed by defendant as President of Company.*

A promissory note, in this form :
 “Durham Woollen Manufacturing
 “Company, Limited, Capital,
 “40,000.

“\$439³⁰/₁₀₀

“Toronto, August 18th, 1868.

“Three months after date
 promise to pay to the order of Ly-
 man, Elliott & Co., at the Canadian
 Bank of Commerce, in Toronto, the
 sum of \$439³⁰/₁₀₀, value received.

“J. P. LOVEKIN,

“President,”

was drawn up by plaintiffs, in pay-
 ment of goods sold and delivered by
 them to the Company and intended
 to be the note of the Co., and when
 signed by defendant, as president,
 was delivered to plaintiffs and re-
 ceived by them as the note of the
 Company, with the blank before
 the word “promise” not filled up ;
 moreover, on default in payment,
 the note was charged to the Com-
 pany :

Held, that the promise was that
 of the Company, and that defendant
 was not personally liable.—*Lyman*
v. Lovekin, 363.

See COMMON COUNT FOR MONEY
 PAID.

See BILLS OF EXCHANGE AND PRO-
 MISSORY NOTES.

QUARTER-MASTER.

See VOLUNTEER OFFICER.

RAILWAYS AND RAILWAY
 COMPANIES.

Special contract for carriage—
Pleading.

To a declaration against defen-
 dants, setting out a special contract
 entered into with plaintiff to carry
 certain cattle, whereby plaintiff un-
 dertook “all risk of loss, injury,
 damage, and other contingencies in
 loading, unloading, transportation,
 conveyance, and otherwise, no mat-
 ter how caused,” and alleging the
 consequent duty on defendants’
 part to furnish suitable and safe
 carriages, and the breach of such
 duty, whereby some of the cattle
 were killed and others injured, de-
 fendants pleaded this special con-
 tract, and that while said cattle
 were being so conveyed a door of
 one of the cars became open, and
 some of the cattle fell out and were
 injured :

Held, on demurrer, a good plea,
 and that (following *O’Rorke v. G.*
W. R. Co., 23 U. C. 427) the terms
 of the special contract protected de-
 fendants against liability for the
 damage caused by the accident
 mentioned in the plea.—*Hood v.*
Grand Trunk Railway Company,
 361.

RAPE.

Evidence of, in action of seduction,
and duty of Judge.—*See* SEDUC-
 TION, 1.

RELIGIOUS INSTITUTIONS
 ACT.

Trustees under, may maintain eject-
ment in individual names, adding
the description “as trustees.”—*See*
 EJECTMENT.

REPLEVIN.

Inadmissible evidence in, under
plea of non tenuit.—*See* INADMISSI-
 BLE EVIDENCE.

ROAD ALLOWANCES.

By-law of municipality—Right of action against timber licensees.

After the passage of by-laws by a municipality, in accordance with the statute in that behalf, (29 & 30 Vic. ch. 51), for the preservation of the timber on government road allowances, such municipality may maintain an action against timber licensees of the Crown for cutting such timber, even though the licenses were granted before the passage of the by-laws, the licensees at the time of cutting having had notice of the by-law.

Quere, whether such licenses confer the right to cut timber on the road allowances; *Semble*, not.—*The Corporation of the Township of Barrie v. Gillies et al.*, 369.

ROAD COMPANY.

Portion of road running through town.

Plaintiffs, a joint stock road company, were in operation, in possession of their road and in receipt of tolls several years before the incorporation of the town of Clifton, within which portion of the road in question lay:

Held, following *Regina v. Brown and Street*, 13 C. P. 356, that plaintiffs were still entitled to collect the tolls within the limits of the town of Clifton, notwithstanding the incorporation of that town and the erection of some of plaintiffs' toll gates within the limits of such town.—*Corporation of the Town of St. Catharines v. Gardner*,* 107.

2. *Right to levy toll.*

The plaintiffs were incorporated as a road company for the purpose

of planking or gravelling the road between the point of intersection of Yonge Street with Bloor Street, on the northern limits of the city of Toronto, and the township of Vaughan, by way of the College Avenue Gate and a point called "Palin's Corners." In 1853 the village of Yorkville was incorporated, and in September, 1854, that corporation passed a by-law, with a view to bringing the travel through the village, authorizing the conveyance by them to plaintiffs of that part of the Davenport Road lying between Yonge Street and "Palin's Corners," for the purpose of being planked or gravelled, under certain conditions specified, one of which was that defendants should levy a higher rate of tax upon those going south from the Corners, than on those going east, *i.e.*, through the village. Articles of agreement were accordingly drawn up between the corporation and plaintiffs, reciting the by-law, and then proceeding to state that the corporation thereby granted to plaintiffs said piece of road, measuring 833 yards, which the plaintiffs thereupon macadamized:

Held, that they could not collect toll on such portion, as no resolution had been passed by defendants for the purpose of constructing the piece of road in question, nor registered under sec. 11 of 16 Vic., ch. 190, which section was held to apply, though no additional stock was taken.

Per Gwynne, J., that the conditions on which plaintiffs had obtained the road, as to preferential rates of stock, &c., were unauthorized by the Act (16 Vic. ch. 190), and for this reason also they did not take it at all.

But, *Held*, that the main gate of defendants' road having been altered

* Pending in Appeal.

in accordance with the decision of the Court of Q. B. (27 U. C. 494), plaintiffs were entitled to collect toll on that portion of their road running south, as shewn by the plan below, from Palin's Corners to Bloor Street.—*Yorkville and Vaughan Plank Road Company v. Baldwin*, 312.

SALE OF GOODS.

Statute of Frauds—Acceptance—Goods not answering contract.

There may be an acceptance of goods, so as to take the case out of the Statute of Frauds and let in proof of the parol bargain, leaving the parties still able to object that goods do not answer the contract, &c.—*McMaster v. Gordon*, 16.

By non-resident assignee.]—See WARRANTY.

SALE OF LIQUOR WITHOUT LICENSE.

1. *Conviction for selling liquor without license—Return of magistrate conclusive—32 Vic. ch. 32, sec. 6, sub-sec. 6.*

A license to sell spirituous liquors, whether by wholesale or retail, is not necessary either in the case of a tavern or a shop, and in the case of a shop it must not be consumed on the premises or sold in quantities less than a quart. Therefore, the sale of a bottle of gin without a license is contrary to law; and *Semble*, that even if a license be necessary only on a sale by retail, the sale of a bottle, value sixty cents, would be a sale by retail.

It is not necessary, in a conviction for selling liquor without license, to mention the statute

under which the conviction took place; nor that it should appear on the face of the conviction that the prosecution commenced within twenty days of the commission of the offence, nor to specify that it is a first or second offence; nor to whom the liquor was sold; neither is it illegal to award imprisonment in default of distress, &c.

The informer is a competent witness in cases arising under 32 Vic. ch. 32 (Ont.)

In this case the depositions returned to the Court by the convicting magistrate under a *certiorari*, shewed that there was no evidence of a license produced before him, while the affidavits filed on the application to quash stated that the party had a license in fact and produced evidence of it before the magistrate, who, moreover, himself swore that he believed a license was produced, but it was either not proved or given in evidence:

Held, that the return to the *certiorari* was conclusive, and that the Court could not go behind it.

Per Gwynne, J., that although no new by-law had been enacted by the municipality under sec. 6, sub-sec 6, of the above act, the applicant was bound to have paid for the license, which he had in fact obtained, the amount due under the by-law then in force, and that the payment, after complaint, but before judgment, of the sum fixed by the latter Act did not enure to make the license valid from its date.—*Regina v. Strachan*, 182.

2. *Sale of liquor without license—32 Vic. ch. 32 (Ont)—Conviction—Sufficiency.*

The owner of the shop is criminally liable for any unlawful act done therein, in his absence, by

clerk or assistant; as, for instance, in this case, for the sale of liquor without license by a female attendant.

Secus, *semble*, if it appeared that the act of sale was an isolated one, wholly unauthorized by him, and out of the ordinary course of his business.

In this case the conviction was under 32 Vic. ch. 32 (Ont.), and set out that defendant sold spirituous liquor by retail without license, stating time and place: *Held*, sufficient, and that it was not necessary to specify kind and quantity.—*Regina v. King*, 246.

SALE FOR TAXES.

Irregularity.

The warrant, on a sale for taxes, contained two different entries of the same lot for taxes due for two successive years. The sheriff sold the lot for the first year's taxes, then adjourned the sale in consequence of other lots remaining unsold, and at a subsequent date sold the same lot for the second year's taxes to another party:

Held, that the warrant was wrong in entering the same lot twice, as if two separate properties, and that the sale was void; the first, because the sheriff did not sell for all the taxes appearing to be due; the second, because, having previously, at the same sale, and under the same warrant, sold the land to one, he could not sell it again to another.—*Schaefer and Wife v. Lundy*, 487.

SCHOOL RATES.

Levy upon non-resident of school section.

School trustees, and collectors under their warrants, have no power, either under Consol. Stat. U. C. ch. 64, or 23 Vic. ch. 49, to levy on the property of a non-resident of the school section for rates assessed in respect of property within that section.—*The Chief Superintendent of Education In re Chapman v. Thrasher et al.*, 259.

SEDUCTION.

Evidence of rape—Duty of Judge—New trial refused.

Held, following *Walsh v. Natrass*, 19 C. P. 453, that where, in an action of seduction, the evidence of the witness shews that a rape was committed upon her, it is the duty of the Judge, in the interests of public justice, to stop the case, and not leave it to the jury, with a direction to find for defendant, if in their opinion it was rape; and this, even where the Judge himself is not clear that a rape has been committed. But, *Held*, that defendant cannot set aside the verdict for misdirection in this respect, as this will only be done in the interests of public justice.—*Williams v. Robinson*, 255.

2. *Action by brother in loco parentis—Misdirection.*

In an action of seduction (both parents being dead), brought by the brother of the girl seduced, who was living with him at the time of the seduction, under an agreement to remunerate her for her services, the Court refused to set aside a verdict for the plaintiff, on the ground of misdirection in telling the jury that plaintiff was legally entitled to damages for distress of

mind, injury to the feelings and reputation, and disgrace brought upon him, as standing *in loco parentis*.—*Paterson v. Wilcox*, 385.

SETTING ASIDE VERDICT.

Defective notice of trial—Promptness in objecting—Partition suit issue—Law Reform Act.

Where a defendant is not misled by a notice of trial, any trifling irregularity therein, as, in this case, the omission of the words, "In the matter of partition between" before the plaintiff's and defendant's names, in the style of cause, will not entitle defendant to set aside the verdict; and, irregularities of this kind should be objected to promptly, otherwise the Court will not interfere.

Issues in Partition suits are within the Law Reform Act (32 Vic. ch. 6, sec. 17, sub-sec. 2, Ont.)—*Symonds v. Symonds et al.* 271.

Irregularly obtained, without costs.]
—See PROMISSORY NOTE, 1.

SLANDER.

Certificate for full costs—31 Vic. ch. 24 (Ont.)

In an action for slander plaintiff is entitled, under a certificate for full costs, pursuant to 31 Vic. ch. 24 (Ont.), to tax full costs of suit; but, per Gwynne, J., he is not so entitled, without a certificate, upon the ground that some of the words mentioned in the declaration are not actionable without specific damage laid.—*Stewart v. Moffatt*, 89.

SLANDER OF TITLE.

Allegation of special damage—Pleading.

In an action for slander of title, the declaration should not only contain an allegation that the words complained of as conveying the slander are false and maliciously uttered, but also an express allegation of some special damage resulting from the slander *actually sustained*, and such special damage must appear upon the face of the declaration to be the mere natural and direct consequence of the words complained of. In this case, therefore, the averment "whereby said M. was prevented from carrying out and completing, and refused to carry out and complete said contract for the purchase of said land from plaintiff, and plaintiff has hitherto lost the sale of said land and the use of the purchase money thereof, and has been unable to sell and dispose of said land, and has incurred and been put to great loss and expense in and about said contract with M., and the enforcement thereof, and in and about quieting the title to said land," was held a sufficient averment of special damage.

The second count of the declaration was for defamation in the use of words not actionable without special damage alleged, and the averment was, "whereby plaintiff lost the friendship, assistance and hospitality of (specifying certain parties) and many others of his neighbours, divers of whom refused and were unwilling, and theretofore, to deal with and transact business with plaintiff, and from whose friendship, hospitality and business dealings plaintiff had derived profit and advantage: Held,

insufficient. — *Ashford v. Choate*, 471.

SPLITTING, CAUSE OF ACTION.

See DIVISION COURT.

STATUTES, CONSTRUCTION.

2 Vic. ch. 6 (C. S. U. C. ch. 84).—See DOWER, 3.

18 Vic. ch. 77, s. 31.—See VOLUNTEER OFFICER.

18 Vic. ch. 130.—See JURY EXPENSES

22 Vic. ch. 18, s. 16.—See VOLUNTEER OFFICER

C. S. U. C. ch. 22, s. 201.—See NOTICE OF TRIAL.

C. S. U. C. ch. 64.—See SCHOOL RATES.

C. S. U. C. ch. 69.—See EJECTMENT.

C. S. U. C. ch. 90, s. 2.—See DEED OF BARGAIN & SALE.

C. S. U. C. ch. 105.—See CONVICTION, 2.

C. S. U. C. ch. 126, s. 2.—See FALSE IMPRISONMENT.

C. S. C. ch. 93, s. 28.—See MALICIOUS INJURY TO PROPERTY.

23 Vic. ch. 49.—See SCHOOL RATES.

25 Vic. ch. 22.—See CONVICTION, 2.

29 Vic. ch. 18, s. 27.—See INSOLVENCY, 2.

29 & 30 Vic. ch. 50.—See CONVICTION, 2.

29 & 30 Vic. ch. 51, ss. 196, 228.—See BY-LAW.

31 Vic. ch. 13 (Ont).—See BY-LAW.

31 Vic. ch. 24.—See SLANDER.

32 Vic. ch. 6, s. 17, subs. 2 (Ont).—See PROMISSORY NOTE, 1, AND SETTING ASIDE VERDICT.

32 Vic. ch. 32, s. 6, subs. 6.—See SALE OF LIQUOR WITHOUT LICENSE, 1, 2.

STATUTE OF FRAUDS.

See SALE OF GOODS.

TAXES.

Irregularity in sale for.] — See SALE FOR TAXES.

TENDER.

See JUS TERTII.

TIMBER LICENSEE.

Trover not maintainable against by wrongdoer, who has cut hay upon limits.]—See TROVER, 1, 2.

Liability to municipality for cutting upon government road—allowances after notice of by-law for preservation of timber.]—See ROAD ALLOWANCES.

TOLL.

Right to levy.]—See ROAD CO., 2.

TROVER.

1. *Timber license—Removal, by licensee, of hay cut on limits by wrong doer.*

The entry of a party on timber limits to cut hay, and his cutting and stacking it on the land, do not give him such property in the hay cut as to enable him to maintain trover for its removal against persons claiming by virtue of Crown licenses then in force.—*McDonald v. Bonfield and Turner*, 73.

2. *Timber licenses—Intruding on Crown Lands.*

Where the plaintiff entered on lands of the Crown, in the summer months, without any right of occupation, and no one hindering him, cut and cured hay, but was prevented from removing it by defendant, who subsequently took possession, under colour of a timber license, which however was only in force during the winter months, *Held*, that the plaintiff had no right of action against the defendant for the value of the hay so cut, the former shewing no better title than the latter.

Quære, as to the rights of licensees during the intervals between successive licenses.—*Graham v. Heenan*, 340.

3. *Sale of goods—Purchase by agent—Indiscriminate appropriation among several principals—Trove against agent's assignee in insolvency.*

M. received money from plaintiff and from others to buy grain on commission. He bought in his own name and from time to time appropriated the warehouse receipts among his principals, without distinguishing in his books, or otherwise, for whom any particular grain had been bought: *Held*, that under the circumstances, more fully set out below, plaintiff could not maintain trover against M's assignee in insolvency for grain not specifically appropriated to him.—*Wilson v. Bockus*, 467.

4. *Property in grain — Verdict against evidence.*

Plaintiff having shipped grain from P., consigned to his agent at O., directing the consignee to hold it subject to the order of defendants, the local agent of defendants at P. concurring therein, but no advance being made on account of the grain, nor any bill of lading endorsed to defendants, nor other transfer of title made, the consignee obtained advances at O. on the grain, and it was sold to repay them:

Held, that defendants had not incurred any responsibility to plaintiff.

The jury having found that the consignee was agent of defendants, but that finding being manifestly against evidence, *Held* that defendants were entitled to the *postea*.—*Wilson v. Bank of Montreal*, 411.

See APPROPRIATION OF GOODS SOLD.

See CHATTEL MORTGAGE, 2.

UNIFORMITY OF DECISION.

Adhering to previous decision of same court, differently constituted, though individually disapproving of same.

Held, on demurrer to the plea in this case, as amended in accordance with the suggestion contained in the judgment of this court, as then constituted, (18 C. P. 141), by the additional averment of notice to plaintiff of defendant's election to stop running the vessel, and that plaintiff did not pay or offer to pay the deficiency, that, whatever might be the individual opinions of the present members of the court, and however inclined to take the opposite view, the plea so amended must nevertheless be held good, in accordance with the judgment previously pronounced, until the reversal of that judgment by a higher court.—*Thompson v. Leach*, 241.

UNSEAWORTHINESS.

See MARINE INSURANCE, 1.

UNSETTLED ACCOUNT.

See DIVISION COURT.

VOLUNTEER OFFICER.

Cavalry troop—Quarter-master—Horse exempt from distress—22 Vic. ch. 18, sec. 16—18 Vic. ch. 77, sec. 31.

Plaintiff was, under commission from the Governor General, dated 28th May, 1859, appointed *quarter-master* in a troop of volunteer militia cavalry: *Held*, that under the general powers conferred by 22 Vic. ch. 18, sec. 16, the Comman-

der-in-chief might, at the date of this commission, have appointed a quarter-master to be attached to a cavalry troop, and that so long as he was serving with, or attached to, such troop he was an officer thereof, and his horse protected from distress under sec. 31 of 18 Vic. ch. 77.—*Davey v. Cartwright*, 1.

WAREHOUSE RECEIPT.

Insurance—Insurable interest.

A., a warehouseman, insured certain wheat with the defendant's Company, and assigned the policy to a bank, to whom he gave a warehouse receipt, signed by B., his clerk, and endorsed by himself. In an action on the policy, on behalf of the bank, *Held*, reversing the judgment of the Court of Common Pleas, 18 C. P. 192, Spragge, C., Mowat, V. C., and A. Wilson, J., dissenting, that the bank had no insurable interest, as B. was not a warehouseman within the C. S. C., ch. 54, sec. 8, and that the receipt was not in compliance with 24 Vic., ch. 23, sec. 1, not being signed by the warehouseman.—*Todd (Respondent) v. Liverpool and London Globe Insurance Company (Appellants)* 523.

See APPROPRIATION OF GOODS SOLD.

WARRANT.

Though good on face will not protect magistrate under C. S. U. C. ch. 126, sec. 2, unless issued on proper information.—*See* FALSE IMPRISONMENT.

WARRANTY.

Assignment—Non-resident assignee—Sale of goods—Express or implied

warranty—Liability for defect in title—New trial—Pleading.

Defendant, having been appointed by the proper authority official assignee in insolvency for a county in which he was non-resident, assuming to act as such assignee, sold the goods of the insolvent to plaintiff, who purchased on defendant's assertion that he had the right to sell, after full discussion between the parties as to this right, and plaintiff, having been satisfied by defendant's assertion, made in the honest belief that he had such right. The sale to plaintiff having been pronounced invalid, *Held*, that defendant's honest belief in his right to sell, as assignee, did not protect him from liability to plaintiff, if he warranted his title, nor was the knowledge on plaintiff's part of the possible defect in defendant's title fatal to the warranty on the sale of the goods.

Held, also, that had nothing occurred beyond the discussion of his title, and plaintiff had bought with this full knowledge, defendant would not have been liable; but, as it was clear that after full discussion of the supposed defect of title defendant might have induced plaintiff to buy on express warranty, a new trial was granted to ascertain this fact:

The third count of plaintiff's declaration alleged that defendant, by falsely pretending and representing himself to be official assignee of the insolvent, and as such to have a lawful right and title to the goods then in his possession, and to sell and deliver same to plaintiff, induced plaintiff to buy same, and thereupon plaintiff paid defendant for same, whereas, in truth, defendant was not such as-

signee, and had no right to sell, whereby the goods were lost to plaintiff, and taken from him by process of law: *Held*, a good count, as a count in case upon a breach of warranty. —*Johnston v. Barker*, 228.

ERRATUM.

In last line of last paragraph but one of head-note to *Waterous v. Bishop*, at page 29, between the words "itself" and "be old" insert—is new, if the contrivance itself be old.



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